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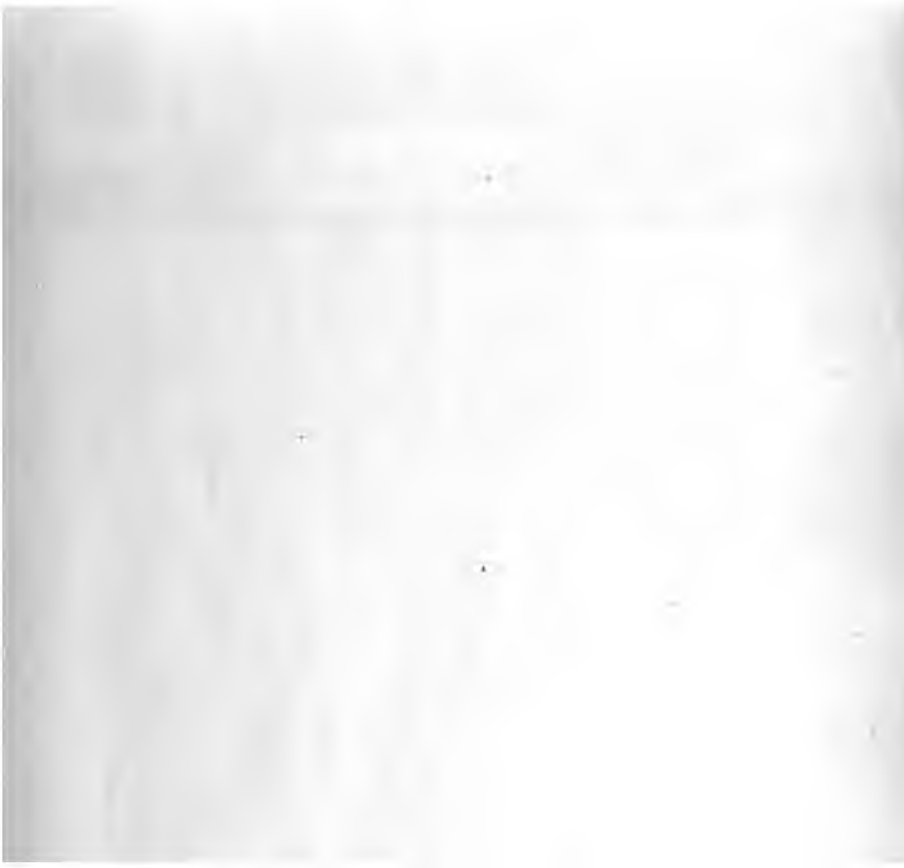

# MUNICIPAL CORPORATION CASES

ANNOTATED.

A COLLECTION OF ALL

CASES AFFECTING MUNICIPAL CORPORATIONS
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY
THOMAS JOHNSON MICHIE.

VOLUME IV.

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# MUNICIPAL CORPORATION CASES.

## VOLUME IV.

DAVIS

*v.*

CITY OF LEBANON.

(*Court of Appeals of Kentucky, June 12, 1900.*)

**Negligence of Fire Department—Liability of Municipality.***—A city is not liable for damage caused by the negligence of its fire department in throwing water upon merchandise, while in the performance of its duties.

APPEAL by plaintiff from Marion county circuit court. *Affirmed.*

*Finley Shuck*, for appellant.
*H. P. Cooper*, for appellee.

GUFFY, J. The appellant instituted this action in the Marion circuit court against the appellee, seeking to recover judgment for $500, the value of property alleged to have been destroyed by the negligence of appellee's employees. The material part of the petition reads as follows: "Plaintiff further states that the city of Lebanon, Ky., was then, and is now, a city of the fourth class, as classified by the statutory law of Kentucky, and was incorporated under said laws, with power and authority to sue and be sued by that name. Said city at said date was the owner of a water service, and an establishment consisting of fire plugs, hose and hose carriers, nozzles, and all the paraphernalia for throwing large quantities of water for extinguishing fire and other purposes. Said city had in its employ at said date a company of men, organized and

*See Saunders *v.* City of Ft. Madison (Iowa), 3 Mun. Corp. Cas. 553 and *notes*, p. 556 *et seq.*

controlled by said city, and employed for the purpose of operating said water service, fire plugs, and apparatus aforesaid; and said defendant did on the date aforesaid, by its agents and servants aforesaid, to wit, the company of men aforesaid in its employ, willfully and carelessly and negligently, and without right, throw water in large quantities, from said fire plug, water service, and hose, which was then under the control and in the possession of defendant, its agents and employees, upon the aforesaid goods, wares, and merchandise of plaintiff, contrary to the consent and against the will of plaintiff, and thereby destroyed and injured said goods, wares, and merchandise of plaintiff, to her great damage, to wit, $500. Whereupon plaintiff prays judgment against defendant for $500 and her costs in this case, and all proper relief." To this petition the defendant demurred, and its demurrer was overruled by the court. Afterwards plaintiff filed the following amended petition: "The plaintiff comes, and by leave of court amends her petition herein in order to make more specific the allegations of ownership of the water service and fire plugs mentioned in the petition. She says the said water service and fire plugs are the property of the Lebanon Water Company, a stock company duly organized and created by the laws of Kentucky. The whole of the stock in said company is owned by the city of Lebanon, Ky. The defendant, the city of Lebanon, operates said water service and fire plugs under a lease or agreement between said city and said water company, by which lease or agreement said city has, and had at the time of the injury complained of, the control of said fire plugs and water service connected therewith." The answer of appellee denied the ownership of the water establishments, fire plugs, etc., and denied that it had in its employ a company of men, organized and controlled by it, for the purpose indicated in the petition. It is further denied that appellee injured or damaged plaintiff's goods. In an amended answer it is substantially alleged that the destruction of plaintiff's goods, if any were destroyed, was the result

of plaintiff's own negligence. This answer was traversed by reply. At the conclusion of plaintiff's testimony, the court, on motion of defendant, instructed the jury peremptorily to find for the defendant, which was accordingly done; and plaintiff's motion for a new trial having been overruled, she prosecutes this appeal.

It may be conceded that the evidence introduced tended to sustain the allegations of the petition. The only ground relied on for a new trial is that the court erred in giving the peremptory instruction, and that the verdict is contrary to law and evidence. The sole question presented for decision is whether the city of Lebanon is responsible for the damage inflicted upon the plaintiff, under the facts and circumstances as alleged and proved. The appellee is authorized by law to establish and provide for the prevention and extinguishment of fire, and it seems that such authority may be treated as a governmental function. It seems to us that under the principles announced by this court in Greenwood *v.* City Louisville, 13 Bush 226, plaintiff was not entitled to recover in this action. The question as to the liability of the individuals for wanton and reckless destruction of property, if such there was, is not presented for decision. It does not appear in this case that either the city or fire company intentionally destroyed plaintiff's property for the purpose of checking or arresting the spread of the fire, and for the protection and benefit of other property. Hence that question is not presented for decision. Judgment affirmed.

## DEXTER

*v.*

## CITY OF BOSTON.

(*Supreme Judicial Court of Massachusetts, May 22, 1900.*)

**Local Assessments—Frontage Rule—Constitutionality of Statute.***—St. 1892, c. 402, of Massachusetts is unconstitutional in its requirement that all expenses incurred in the making of a sewer in the city of Boston, to an amount not exceeding four dollars for each lineal foot of sewer, shall be repaid to the city as the assessable cost of the work, by the owners of the several parcels of land bordering on the highway or strip of land in which the sewer is made, and in its direction that this assessable cost shall be apportioned to each parcel in proportion to the number of lineal feet which it measures on said highway or strip of land.

**Same—Same.**—Local assessments must be founded on the benefits, and be proportional to the benefits.

**Same—Same—Recovery from City—Remedies.**†—A local assessment made under an unconstitutional statute, and paid under protest, from compulsion, may be recovered back in an action against the city.

**Same—Same—Same.**—The fact that the collection of such an assessment was made by adding part of the assessment to the general tax of the plaintiff, did not affect his right to recover it back in an action against the city.

REPORT from Suffolk county superior court. *Judgment for plaintiff.*

*John Lowell* and *H. H. Darling*, for plaintiff.
*Samuel M. Child*, for defendant.

KNOWLTON, J. In its essential features, this case is like Weed *v.* City of Boston, 172 Mass. 28, 51 N. E. 204, 42 L.

*See *note*, 3 Mun. Corp. Cas. 652 *et seq.*

†See *note*, 1 Mun. Corp. Cas. 561; 2 Mun. Corp. Cas. 249 *et seq.*

Dexter *v.* City of Boston

R. A. 642, in which it was held that St. 1892, c. 402, is unconstitutional, in its requirement that all expenses incurred in the making of a sewer in a highway or strip of land or other place in the city of Boston, to an amount not exceeding four dollars for each lineal foot of sewer, shall be repaid to the city, as the assessable cost of the work, by the owners of the several parcels of land bordering on the highway or strip of land in which the sewer is made, and in its direction that this assessable cost shall be apportioned to each parcel in proportion to the number of lineal feet which it measures on said highway or strip of land. It is now settled law in this court, as it is in the supreme court of the United States and in many other courts, that after the construction of a public improvement a local assessment for the cost of it cannot be laid upon real estate, in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits, and be proportional to the benefits. So far as there is anything in the early cases which seems at variance with this doctrine, it is controlled by the later decisions. Sears *v.* Board, 173 Mass. 71, 53 N. E. 138, 43 L. R. A. 834; Same *v.* Commissioners, 173 Mass. 351, 53 N. E. 876; City of Boston *v.* Boston & A. R. Co., 170 Mass. 95, 49 N. E. 95; Weed *v.* City of Boston, *supra*; Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. The principle involved has been so recently and so fully considered in the cases above cited, that it is unnecessary to discuss it at length in this opinion. It was shown in Weed *v.* City of Boston that as applied to the facts of that case, and of many supposable cases, the requirements of the statute might produce assessments upon some estates greatly in excess of the benefits received, and, as compared with other states, greatly disproportionate to the benefits. For this reason the statute was declared unconstitutional. In determining whether a statute is unconstitutional, the question is not whether the result is harmful in the particular case, but whether the statute, according to its terms, will violate the

Local Assessments—Frontage Rule—Constitutionality of Statute.

Same—Same.

provisions of the constitution in its application to cases which may be expected to arise. The case then before the court furnished a demonstration of the injustice and deprivation of constitutional rights which might result from the enforcement of the statute. The present case illustrates in a similar way that the assessments on different lands made under this statute are not always proportional to the benefits. There is a great difference in value on account of the difference in grade between lands at different points along the line of the sewer, and there is the same kind of question that was referred to in Weed *v.* City of Boston in regard to an assessment upon land on the southerly side of Ashford street, so called, where there is intervening land in private ownership between the strip taken in the private way called "Ashford Street" and the parcel on which the assessment was made. There is also an important fact which was wanting in the other case, namely, that the sewer turns at right angles where it enters Ashford street, and runs on two sides of the parcel at the corner. As the assessment was required to be made according to the lineal measurement of the land along the sewer, that parcel, which receives but slight additional benefit from the turn in the sewer, is doubly assessed. That part of the statute which directs the making of assessments in this way is unconstituional and void. The action of the street commissioners in making the assessment rests on this part of the statute, and it is impossible to find anything in it that stands upon a valid part of the statute which is separable from the part that is objectionable. The assessment was therefore void, and the payment by the plaintiff, having been induced by compulsory process and made under protest, may be recovered back in this action. Sumner *v.* First Parish in Dorchester, 4 Pick. 361; Lincoln *v.* City of Worcester, 8 Cush. 55; Wright *v.* City of Boston, 9 Cush. 233, 241; Goodrich *v.* Inhabitants of Lunenberg, 9 Gray 38; Gerry *v.* Inhabitants of Stoneham, 1 Allen 319; Day *v.* City of Lawrence,

Same—Same—Recovery from City—Remedies.

167 Mass. 371, 45 N. E. 751; City of Somerville *v.* City of Waltham, 170 Mass. 160, 48 N. E. 1092.

This is not like a case where there is a mere irregularity in the proceedings, which must be taken advantage of by a writ of *certiorari*. Action under an unconstitutional statute is as if there were no statute. Fisher *v.* McGirr, 1 Gray 1; Connecticut River R. Co. *v.* County Com'rs of Franklin, 127 Mass. 50, 57.

The fact that the collection was made under St. 1891, c. 323, §§ 16, 18, by adding part of the assessment to the general tax of the plaintiff, does not affect his right to recover it back in this proceeding. It did not become a part of his general tax, but was separable from it. When a general tax is excessive by reason of overvaluation, or error in including property that is not assessable, the party is left to his remedy by an application for an abatement, and he cannot recover back the tax in an action of this kind. But the provisions of law which prevent recovery in such cases are not applicable to this assessment. According to the terms of the report there must be judgment for the plaintiff.

Same—Same—Same.

---

CITY OF LOS ANGELES *et al.*

*v.*

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS LAND & WATER COMPANY *et al.*

(*Supreme Court of the United States, April 30, 1900.*)

**Contract between City and Water Company—Regulation of Rates.**—A contract between a city and a water company, under which the company acquired the use of the city's waterworks, and undertook to supply the public with water, reserved the right to the city to regulate the rates to be charged by the company, provided that lower rates than those then charged by the company should not be established. *Held*, that the contention that such provision only

purported to bind the city as landlord and owner, and not as a governmental agent of the state, was not tenable; and the provision limited the city's power as to fixing such rates.

**Contracts—Change in Decisions.**—If such contract was authorized by the then existing state constitution as interpreted by the state court of last resort, it could not be affected by subsequent decisions, or by constitutional changes.

**Establishment of Water Rates by City—Whether Water Company Estopped.**—A water company is not estopped from contending that the establishment of certain water rates by a city violated a contract between it and the city, by reason of the fact that it has collected for fifteen years water rates equally subject to such objection, where it has always protested against the right of the city to establish them.

**Immaterial Question.**—In a suit to determine whether the establishment of certain water rates violated a contract between a city and a water company, it would be irrelevant to show that the revenue of the company has been reduced.

**Right to Equitable Relief—Whether Ordinance Cloud upon Title.**—The contention that the complainant water company had adequate legal remedies, and could not resort to an equitable one, because the ordinance fixing water rates claimed to be in violation of a contract between the city and the company was void on its face, and, therefore, was no cloud on the company's title, was untenable; as the invalidity of the ordinance appeared, not upon its face, but only in connection with extraneous evidence of what were the water rates upon a certain date.

**Excessive Taking of Water—Estoppel of City to Object.**—Where a city has for nearly thirty years allowed a water company to divert from a river a quantity of water much larger than that permitted to be taken under a contract between the city and the company, and to expend vast sums of money upon the faith of a continuance of the right to take the larger quantity of water, it cannot, within the period of the contract, withdraw its consent to the taking of the larger quantity.

APPEAL by defendants from a decree of the circuit court of the United States for the Southern district of California. *Affirmed.*

Statement by MR. JUSTICE MCKENNA:

This suit involves the constitutionality of an ordinance of the city of Los Angeles, adopted February 23, 1897, fixing the water rates to be charged and collected by the Los Angeles

City Water Company for the year ending June 30, 1898.

It is claimed that the ordinance impairs the obligation of the contract made with the grantors of the company on the 20th of July, 1868.

The facts were stipulated, and are substantially as follows:

On the 22d of July, 1868, the city of Los Angeles entered into a contract with John S. Griffin, P. Beaudry, and Solomon Lazard, whereby it leased its waterworks to the said persons and their assignees for a term of thirty years, with the right to lay pipes in the streets of the city, and to sell and distribute the water for domestic purposes to the inhabitants of the city; also with the right to take water from the Los Angeles river at a point at or above the present dam, to be selected within sixty days of the date of the contract. It was provided that no more than 10 inches of water should be taken from the river without the previous consent of the mayor and common council.

The city bound itself not to make any other lease, sale, contract, grant, or franchise to any person, corporation, or company for the sale or delivery of water to the inhabitants of the city for domestic purposes during the continuance of the contract.

And it was provided "that the mayor and common council of said city shall have, and do, reserve the right to regulate the water rates charged by said parties of the second part, or their assigns, provided that they shall not so reduce such water rates or so fix the price thereof to be less than those now charged by the parties of the second part for water."

The said persons agreed to pay the city a rental of $1,500 for the waterworks; to lay down in the streets of the city 12 miles of iron pipes of sufficient capacity to supply the inhabitants with water for domestic purposes; to extend the pipes as fast as the citizens would agree to take sufficient water to pay 10 per cent. upon the cost of such extension; to erect one hydrant, as protection against fire, at one corner of each

crossing of streets where pipes were or might be laid; to erect an ornamental fountain on the public plaza at a cost not exceeding $1,000; to construct and erect, within two years, such reservoirs, machinery, ditches, and flumes as would secure the inhabitants with a constant supply of water for domestic purposes; to furnish water free of charge for the public schoolhouses, hospitals, and jails; to keep in repair all of said improvements, at the cost and expense of the parties of the second part, for said term of thirty years, and to return said waterworks to said party of the first part at the expiration of said term, in good order and condition, reasonable wear and damage of the elements excepted, upon payment to said parties of the value of the aforesaid improvements, to be ascertained as provided for in the contract; to give a bond in the sum of $20,000 for the performance of said contract, and to pay all state and county taxes assessed upon the waterworks during the period of thirty years.

And as the circuit court found:

"Griffin, Beaudry, and Lazard applied for and procured said contract on behalf and for the benefit of themselves and other persons, with the intention of forming a corporation to carry out said contract, and afterwards, about the middle or latter part of August, 1868, themselves and said other persons being the incorporators, organized, under the laws of the state of California, the Los Angeles City Water Company, for the purpose of supplying the inhabitants of said city with water for domestic purposes, etc., under the terms of said contract, and assigned all their rights and franchises under said contract to said company by a written instrument dated June the 12th, 1869, and recorded in the office of the recorder of said county of Los Angeles, June the 15th, 1869.

"On April the 2d, 1870, the legislature of California passed an act hereinafter set forth, in terms ratifying and confirming said contract.

"Griffin, Beaudry, and Lazard did nothing personally in carrying out said contract or constructing or maintaining said waterworks, but said company, after it was organized,

took possession of said waterworks, and has performed all of the above-mentioned obligations of said contract, except the one providing for the return of the waterworks at expiration of lease, and in such performance has laid 320 miles of pipe, erected over 500 hydrants for protection against fire, and constructed 6 reservoirs, with an aggregate capacity of nearly sixty-six millions of gallons, and is now, as it has been at all times since the contract was made, furnishing the city of Los Angeles with water for the extinguishment of fires and for the public schools, hospitals, and jails in said city free of charge. The aforesaid extensions of the waterworks were rendered necessary by the growth of said city, whose population in 1868 was between 5,000 and 6,000, and is now about 103,000.

"During the whole of the year 1868 the territorial limits of the city of Los Angeles were as follows: Four square leagues in a square form, the center of which was the center of the old pueblo plaza.

"About 1872 the limits were extended 420 yards south of the former south boundary, and within the past three years, and prior to July, 1897, the limits were further extended so as to take in between 10 and 15 square miles of additional adjoining territory. Immediately after the extension of the said limits, the Los Angeles City Water Company began to extend its pipes over the said addition to the city as the same was settled up and improved, and ever since has been and is now furnishing water to the people in said district added to the original territory of the city, and, upon the demands of the city council, erected fire hydrants within the said additional territory and furnished water free of charge, and has in all respects continued to lay pipes, erect fire hydrants, and furnish the inhabitants with water for domestic uses in like manner as it has conducted the same business within the original limits of the city as established by the act incorporating it, and so with the more recent extensions of the city limits, to wit, those made within the last three years, the

company has also extended its pipes in portions of those limits and furnished water in the same way.

"The quantity of water required to supply the domestic wants of the people of said city is 1 inch of water, measured under a 4-inch pressure, to every 100 inhabitants. To meet the increased demands upon it for water under said contract, said company has, among other things, purchased the system known as the 'Beaudry System of Waterworks,' and also certain water rights in the Arroyo Seco, and conducted water from the Arroyo Seco into the city on the east side of the Los Angeles river, and has been furnishing the inhabitants of that portion of the city with water from said system, and also acquired the stock of the corporation known as the East Side Spring Water Company,—the same mentioned in paragraph 10 of the complaint.

"In the growth of the city its settlement extended to localities of higher elevation than those occupied by its inhabitants at the time of said contract, and the point originally selected for the diversion of the water of the Los Angeles river for supplying the city and its inhabitants, as in said contract provided, was so located in said river that it was impracticable to there maintain dams and diversion works that would not occasionally be swept away or rendered useless by floods; and the surface water of the river after severe storms became muddy and unfit for supplying the inhabitants with water for domestic uses; and in the year 1889 the Crystal Springs Land & Water Company made excavations in the places referred to in the bill of complaint, and laid the pipes therein as alleged, and the water that has been used by the Los Angeles City Water Company for supplying the city with water, as provided in said contract, has ever since been obtained from that source, except that from time to time a further supply of water has been taken from the Los Angeles river in order to supply said inhabitants, which diversions have been at or near the place where the said underground pipes are laid, and that by these means the water can be delivered to the higher elevations, and the

underground waters, as to quality and amount, are thus protected against the influences of floods.

"The Los Angeles City Water Company ever since its incorporation has taken more than 10 inches of water, measured under a 4-inch pressure, from the Los Angeles river, and the amount taken has increased with the increase of the population of the city and the demands of the municipality itself for water for extinguishing fires and the other public purposes referred to in the said contract, and the amount has increased until now it requires from 1,000 to 1,500 inches of water, measured under a 4-inch pressure, for such purposes, and during the summer season the amount of water used by the Los Angeles City Water Company for the purposes aforesaid runs from 1,000 to 1,500 inches under a 4-inch pressure, inclusive of the water obtained by the underground excavations, which latter furnish from 650 to 690 inches, measured under a 4-inch pressure.

"The city of Los Angeles has always had flowing in the Los Angeles River, at the point from which said Los Angeles City Water Company has always diverted water from said river, a quantity of water sufficient to have supplied said Los Angeles City Water Company with all the water required to supply said city and its inhabitants with water for domestic purposes and municipal uses, and has never objected, up to October 20, 1896, to said Los Angeles City Water Company taking as much water from said river as it might require for said uses, and during all of said period said city has never objected to said company's taking from the surface stream of said river at said point as much water as said company needed for said uses.

"On October the 19th, 1896, the council of the city of Los Angeles adopted a resolution requiring the Los Angeles City Water Company to pay to the city of Los Angeles an amount of money equal to 40 per cent. of the gross rates received by said company from the consumers of water as rental for all water taken by said company from the Los Angeles river, and before the 21st day of October, 1896, to attorn to the

city of Los Angeles, as tenant of said city, for all of the water so taken from said river, and to agree to pay said rental to said city, and, in case of failure to attorn and agree to pay said rental, to refrain from diverting, taking, or interfering with any of the water mentioned in said resolution, except 10 inches after the 20th day of October, 1896.

"On October the 19th, 1896, the city attorney, in writing, notified the Los Angeles City Water Company and the Crystal Springs Land and Water Company of said resolution, and demanded compliance therewith, delivering a copy of said resolution to each of said companies. Neither of them ever attorned to said city for said water or any part thereof, or ever agreed to pay any rental for the same. After the passage of said resolution and ever since said notification, up to the present time, the Los Angeles City Water Company has continually taken from the Los Angeles river, at a point above the northern boundary of said city, for the purposes of distribution and selling the same in said city, a quantity of water varying from 400 to 1,000 inches, measured under a 4-inch pressure.

"On the 19th day of April, 1870, the common council of the city of Los Angeles accepted, and the mayor approved, the following report:

" 'To the Honorable the Mayor and Common Council of the City of Los Angeles and the Los Angeles City Water Company:

" 'The undersigned commissioners, duly appointed on behalf of your honorable bodies to adjust, fix, and establish the rates and charges of the Los Angeles City Water Company (a corporation duly incorporated under the laws of the state of California for the purpose of supplying the inhabitants of Los Angeles City with pure, fresh water), respectfully report that they have established water rates and charges for domestic purposes, taking as a guide, as near as can be, the charges and rates for domestic purposes charged in July, 1868; that your committee have also fixed the rates and

charges for other reasonable objects and purposes, and report as follows, to wit:'

"(Then follow the rates agreed upon.)

"The commissioners referred to in said report had been previously selected, two by the city and two by the Los Angeles City Water Company.

"In June, 1871, the city council, on a report of a committee constituted similarly to the one above mentioned, established the same rates as those established in April, 1870.

"On the 13th of August, 1874 a committee constituted in the same manner and for the same purposes as the committee already mentioned reported that they had established water rates and charges for domestic purposes, taking as a guide, as near as possible, the charges and rates for domestic and other reasonable objects and purposes charged in July, 1868. The report was adopted and a committee appointed in conjunction with the city attorney to draft an ordinance embodying the rates fixed in said report, and thereafter, on August the 20th, 1874, an ordinance so drawn was adopted by the council of said city, and the rates established by said ordinance were the same as those established in 1870 and 1871.

"Since and including the year 1880 the city council of the city of Los Angeles has in February of each year passed an ordinance fixing the rates to be charged by all corporations and persons within said city supplying water to the inhabitants thereof, to be in force for one year from and including July the 1st, which rates have been less than the rates charged in 1870, as contained in the ordinance hereinbefore mentioned, and the Los Angeles City Water Company has collected the rates thus fixed by the city of Los Angeles, and no more, but in the year 1896 the council of the city of Los Angeles passed an ordinance fixing the rates to be charged for water for the year commencing July the 1st, 1896, and ending June 30, 1897, at less than they had ever been fixed before, and a suit was then brought by the complainants herein in this court against the city of Los Angeles to set aside the said ordinance; and in February of the year 1897 the city of

Los Angeles passed the ordinance which is assailed in this suit, making a still further reduction in the rates.

"The action of the Los Angeles City Water Company in collecting the rates fixed by said several ordinances constitutes the only acquiescence (if it be an acquiesence) in the action of said council.

"If the rates established in 1870 were collected for the year beginning July the 1st, 1897, and ending June the 30th, 1898, the revenues received by the Los Angeles City Water Company from said rates would be more than $50,000 in excess of the amount which would be received under the rates named in the ordinance of February, 1897.

"In January, 1882, the Los Angeles City Water Company furnished to the council of the city of Los Angeles a statement of its transactions for the preceding year, protesting at the same time against the establishment of any rates less than those which were in force at the date of the lease hereinbefore mentioned, to wit, July the 22d, 1868.

"In January, 1883, said company again furnished said council with a statement showing the names of the consumers of water, the rates paid during the year preceding the date of the statement, and also an itemized statement of the expenditures made for supplying water during the year preceding, but expressly denying any legal right on the part of the council to demand said statement or to fix any rates less than those which were in force in July, 1868.

"Similar statements, accompanied by similar protests, were made annually thereafter up to and including the year 1889, and since that time unverified statements or reports showing its receipts and expenditurès have been made by said company to the city council each year.

"Article 14 of the present Constitution of California, adopted in 1879, is as follows:

" 'ARTICLE XIV.

" '*Water and Water Rights.*

" 'Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or dis-

tribution, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner to be prescribed by law: *provided*, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed annually by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year, and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the 1st day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city or town, where the same are collected, for the public use.

" 'Sec. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.'

"To carry out these provisions of the Constitution, the legislature of California passed an act entitled 'Act to Enable the Board of Supervisors, Town Council, Board of Aldermen, etc.,' which was approved March the 7th, 1881. Stat. Cal. 1881, p. 54.

"In the year 1888 the electors of the city of Los Angeles,

pursuant to provisions of the Constitution of said state authorizing them so to do, adopted a charter for said city, which charter was, under the provisions of said Constitution, submitted to the legislature of said state for its approval, ratification, and adoption, and the said charter was, on the 31st day of January, 1889, adopted by said legislature, and thereupon became and ever since has been the charter of the said city of Los Angeles; and by the said charter it is provided, in § 193 as follows:

" 'The rates of compensation for use of water to be collected by any person, company, or corporation in said city shall be fixed annually by ordinance, and shall continue in force for one year, and no longer. Such ordinance shall be passed in the month of February of each year, and take effect on the 1st day of July thereafter. Should the council fail to pass the necessary ordinance fixing the water rates within the time hereinbefore prescribed, it shall be subject to peremptory processes to compel action at the suit of any party interested.' Stat. 1889, p. 503.

"The ordinance of 1897 now sought to be annulled was passed pursuant to the foregoing constitutional and statutory provisions." [88 Fed. Rep. 723.]

A decree was entered for complainants (appellees), adjudging that that part of the contract entered into between the city of Los Angeles and Griffin, Beaudry, and Lazard, in so far as said contract provides that the city shall not reduce the water rates below those charged on the date of said contract, is valid, and that the ordinance of February 23, 1897, reduced the water rates below those so charged, and "impaired the obligation of such contract, and said ordinance is null and void; and it is further ordered, adjudged, and decreed that the said ordinance be, and the same is, hereby vacated and set aside and held for naught."

From the judgment this appeal is taken.

The assignments of error present the contentions discussed in the opinion.

City of Los Angeles *v.* City Water Company, etc

*Messrs. S. O. Houghton*, *Walter F. Haas*, and *Lee & Scott*, for appellants.

*Messrs. John Garber*, *S. M. White*, and *J. S. Chapman*, for appellees.

MR. JUSTICE MCKENNA, after stating the case, delivered the opinion of the court:

The circuit court decided that the provision of the contract executed by the city and Griffin, Beaudry, and Lazard constituted a contract, and the ordinance of the city regulating the rates of appellees impaired it. Against this conclusion the appellant contends: (1) The contract only purports to bind the city in its corporate capacity,—the city as landlord and owner, and not as a governmental agent of the state; (2) the city did not have power to bind the state; (3) the provision of the contract, restraining the city from granting any other franchise, if it created an exclusive franchise, invalidated the whole contract; (4) the act of 1870, purporting to ratify the contract of 1868, is unconstitutional and void; (5) the water company has no power under its charter to collect water rates, except as prescribed by the Constitution and statutes of the state; (6) By acquiescing in the regulations of rates ever since 1880 the company is estopped from claiming equitable relief, and is guilty of laches; (7) water rates established by the ordinance are not shown to be lower then those charged in 1868, or if lower, that the revenue of the company is reduced; (8) if the ordinance is invalid, it is void on its face, and there is therefore no cloud on the company's title; (9) the company violated the contract by taking water from the Los Angeles river, and therefore is not entitled to specific preformance.

We will consider these contentions in their order.

1. The contract only purports to bind the city in its corporate capacity,—the city as landlord and owner, and not as governmental agent of the state.

Contract between City and Water Company—Regulation of Rates.

The argument to support the contention, succinctly stated, is that the right to regulate rates came from the contract, not from the law. In other words, it was reserved from the contract, and was a virtual granting back by the lessees of the proprietary right which, would have otherwise passed by the lease, leaving, however, all municipal powers intact.

The provision of the contract is as follows: "Always provided that the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said parties of the second part, or their assigns, provided that they shall not so reduce such water rates, or so fix the price thereof, to be less than those now charged by the parties of the second part for water."

The municipal powers of the city provided in the act of ncorporation, among others, were: "To make by-laws or ordinances, . . . to make regulations to prevent and extinguish fires, . . . to provide for supplying the city with water."

It is not denied that the city had power to regulate rates. Indeed, it is insisted that it was so constantly its duty that it it could not be contracted away. It was not a power, therefore, necessary to be granted by the contract, and the distinction between the proprietary right and the municipal right, made by appellants, would have been idle to observe. To have limited the right of regulation to the city in one capacity, and left it unrestrained in the other, would have been useless, and such intention cannot be attributed to the parties. We think, therefore, the power to regulate rates was an existent power, not granted by the contract, but reserved from it, with a single limitation,—the limitation that it should not be exercised to reduce rates below what was then charged. Undoubtedly there was a contractual element; it was not, however, in granting the power of regulation, but in the limitation upon it. Whether the limitation was and is valid is another consideration.

2. The city did not have the power to bind the state.

This contention as expressed is very comprehensive, and seems to deny the competency of the state to give the city the power to bind it. We do not, however, understand counsel as so contending, nor could they. Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. Rep. 77. See also People *v.* Stephens, 62 Cal. 209. We understand the argument to be that the power, if not expressly given will not be presumed unless necessarily or fairly implied in or incident to other powers expressly given,—not simply convenient, but indispensable to them. In other words, the rule of strict construction is invoked against the grant of such power to the city.

Contracts—Change in Decisions.

The rule is familiar. It has often been announced by this court, and quite lately in Detroit Citizens' Street R. Co. *v.* Detroit R. Co., 171 U. S. 48, 43 L. Ed. 67, 18 Sup. Ct. Rep. 732.

The effect of the rule in the case at bar we are not required to determine if the act of 1870 ratifying the contract is valid.

It reads as follows:

"An Act to Ratify Certain Acts and Ordinances of the Mayor and Common Council of the City of Los Angeles.

"The people of the state of California, represented in senate and assembly, do enact as follows:

"Sec. 1. The following acts, contracts, and ordinances of the mayor and common council of the city of Los Angeles are hereby ratified and confirmed: The contract and lease for the care and maintenance of the Los Angeles City Waterworks, entered into and made between the mayor and common council of the city of Los Angeles, on the one part, and John S. Griffin, Prudent Beaudry, and Solomon Lazard, on the other part, dated the twentieth (20th) day of July, eighteen hundred and sixty-eight (1868); and also the ordinance confirmatory of the same, passed July the twenty-second (22d), eighteen hundred and sixty-eight, which contract and ordinance are recorded in the office of the county recorder of Los Angeles county, in book one of miscellaneous records, pages

four hundred and twenty-eight (428) to four hundred and thirty-one (431); (here follows certain other ordinances and deeds not affecting the contract in question)."

Appellants assert that the act violates the following provision of the the Constitution of the state:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." [Art. 4, § 31.]

At the time of the passage of the act of 1870 the contract of 1868 had been assigned to the water company, and the facts show that it was applied for and procured on behalf of Griffin, Beaudry, and Lazard, and other persons, with the intention of forming a corporation to execute its provisions, and for such purpose they and other persons organized under the laws of the state the Los Angeles City Water Company, the appellee. It is hence argued that the act of 1870 confers franchises on the company by a special act, instead of by a general law, and thereby infringes the constitutional provision, and against the existence of such power in the legislature the following cases are cited: Low *v.* Marysville, 5 Cal. 214; San Francisco *v.* Spring Valley Waterworks, 48 Cal. 493; Oroville & V. R. Co. *v.* Plumas County Supers., 37 Cal. 354; Spring Valley Waterworks *v.* Bryant, 52 Cal. 132; San Francisco *v.* Spring Valley Waterworks, 53 Cal. 608.

Of these cases, only Low *v.* Marysville and Oroville & V. R. Co. *v.* Plumas County Supers. were decided before the passage of act of 1870.

It was held in Low *v.* Marysville that the legislature was prohibited from conferring upon a municipal corporation powers other than governmental by a special act. CHIEF JUSTICE MURRAY said: ". . . for as it would have been a violation of the Constitution to create an incorporation by special act, for any other than municipal purposes, it follows that it would be equally unconstitutional to confer special

power on a corporation already created. In other words, it would be doing, by two acts, that which the legislature could not do by one; and corporations for almost every purpose might be created by special act by first incorporating the stockholders as a municipal body.

But in California State Teleg. Co. *v.* Alta Teleg. Co., 22 Cal. 398, decided at July term, 1863, a contrary doctrine was announced. It was held that the legislature could grant exclusive franchises and privileges to persons or corporations; that if granted to a person they could be assigned to a corporation, and that a corporation could receive from the legislature a direct grant of special privileges and franchises. The case necessarily involved all of those propositions.

The right and privilege passed on were granted by an act of the legislature, and consisted of the exclusive right to O. E. Allen and Clark Burnham to construct and put in operation a telegraph line from San Francisco to the city of Marysville. They assigned the right to the California State Telegraph Company. The court said: "The case presents the following questions for our adjudication: 1st. Is the act of May 3d, 1852, granting certain exclusive privileges to Allen and Burnham, constitutional? 2d. Have the plaintiffs the power or right to purchase, hold, and enjoy these exclusive privileges?"

Both propositions were answered in the affirmative. Of the second the court said:

"The next and most important question is whether the plaintiff, a corporation, had the power to purchase and hold the special privileges granted by the act to Allen & Burnham. It is not disputed that those grantees had power to sell and convey, for the act specially makes the grant to them or 'their assigns,' thus clearly making the privileges assignable. But it is urged that the clause in the Constitution which prohibits the legislature from creating a private corporation by special act equally prohibits them from conferring any powers or privileges of a corporate character by special law; and that all the powers and privileges which a corporation can exercise

or hold must be derived from a general law, applicable alike to all corporations.

"It is clear that the Constitution prohibits the legislature from 'creating' corporations by special act, except for municipal purposes; and it is equally clear that this prohibition extends only to their 'creation.' There is nothing in the language used which either directly or impliedly prohibits the legislature from directly granting to a corporation already in existence and created under the general laws, special privileges in the nature of a franchise, by a special act, or prohibiting a corporation from purchasing or holding such franchises which may have been granted to others. To give the Constitution any such effect we would be compelled to interpolate terms not used, and which cannot be implied without a perversion of the language employed. To give it such a construction we would have to make it read thus: 'Corporations may be formed, *and other franchises and special privileges granted*, under general laws, but shall not be created *or granted* by special act, except for municipal purposes.' If such had been the meaning intended by the framers of the Constitution, they could have easily expressed it in apt words. The language used by them is clear, and they well knew that it included but one of a numerous class of franchises, the subjects of legislative grant, and that a regulation of one could not by any reasonable implication be extended to others not mentioned."

And the learned justice who delivered the opinion of the court concluded the discussion by saying: "I hold, then, that the plaintiffs, as a corporation, were capable of receiving a grant of these special privileges directly from the legislature, and of purchasing them from the grantees."

There was an implied recognition of the same doctrine in Spring Valley Waterworks *v.* San Francisco, 22 Cal. 434.

But it is urged by appellants that Oroville & V. R. Co. *v.* Plumas County Supers. (decided in April, 1869) held "that the legislature could not authorize the county to grant special privileges to a private corporation, and this was confirmed

in Waterloo Turnp. Road Co. *v.* Cole, 51 Cal. 384 (decided in 1876)." The latter case we may disregard, as it was decided subsequently to the act of 1870. The former case did not decide as contended, nor was the point involved in it. The action was *mandamus* to compel the county to subscribe to the capital stock of the railroad company under an act of the legislature directing the supervisors of the county to meet at a designated day and take and subscribe to the capital stock of the railroad company.

The defense was not want of power in the legislature to direct the subscription, not want of power in the company to receive it because it was a corporation, but want of power to receive because it was not a corporation. Against this it was urged that the act of the legislature recognized the company as a corporation. To the contention the court replied: "But it is claimed that the existence of the corporation is recognized by the act requiring the county to subscribe to the stock of the company. Admitting such to be the case, that will not overcome the difficulty, for a corporation of this character cannot be created by legislative recognition; the Constitution (art. 4, § 31) prohibiting the creation of corporations, except for municipal purposes, otherwise than by general laws."

It follows, therefore, that at the time of the contract of 1868 and of the passage of the ratifying act of 1870 it was established by the decision of the highest court of the state that the Constitution of the state permitted a grant of special franchises to persons and corporations, and permitted the latter to receive assignments of them from such persons, or grants of them directly from the legislature. This law was part of the contract of 1868, as confirmed by the act of 1870, and could not be affected by subsequent decisions. Rowan *v.* Runnels, 5 How. 134, 12 L. Ed, 85; Ohio L. Ins. & T. Co. *v.* Debolt, 16 How. 416, 14 L. Ed. 997; Havemeyer *v.* Iowa County, 3 Wall. 294, 18 L. Ed. 38; Chicago *v.* Sheldon, 9 Wall. 50, 19 L. Ed. 594; Olcott *v.* Fond du Lac County Supers., 16 Wall. 678, 21 L. Ed 382; McCullough *v.* Virginia,

172 U. S. 102, 43 L. Ed. 382, 19 Sup. Ct. Rep. 134. Nor by the new Constitution of 1879. New Orleans Gaslight Co. *v.* Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650, 29 L. Ed. 516, 6 Sup. Ct. Rep. 252; Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 29 L. Ed. 587, 6 Sup. Ct. Rep. 329; St. Tammany Waterworks *v.* New Orleans Waterworks, 120 U. S. 64, 30 L. Ed. 563, 7 Sup. Ct. Rep. 405.

The subsequent decisions of the supreme court of the state have not been uniform. San Francisco *v.* Spring Valley Waterworks unqualifiedly overruled California State Teleg. Co. *v.* Alta Teleg. Co. but People *ex rel.* Atty. Gen. *v.* Stanford, 77 Cal. 360, 2 L. R A. 92, 18 Pac. 85, 19 Pac. 693, restored its doctrine to the extent, at least, of holding that the constitutional provision that "corporations may be formed by general laws, but shall not be created by special act," only prohibits thecreations of corporations and conferring powers upon them by legislative enactment, and does not prohibit "the assignment of a franchise to a legally organized corporation by persons having the lawful right to exercise and transfer the same." See also San Luis Water Co. *v.* Estrada, 117 Cal. 168, 48 Pac. 1075.

There are expressions in the latter case which, it is urged, that notwithstanding the modification by it and by People *ex rel.* Atty. Gen. *v.* Stanford of the doctrine of San Francisco *v.* Spring Valley Waterworks, make that doctrine applicable to the case at bar. The San Luis Water Company was a corporation, and was formed for the purpose of furnishing the town of San Luis Obispo and the inhabitants thereof with pure fresh water.

By an act of the legislature entitled "An Act to Provide for the Introduction of Good and Pure Water into the Town of San Luis Obispo," approved March 28, 1872, a franchise was granted for that purpose to M. A. Benrimo, C. W. Dana, and W. W. Hays. The San Luis Water Company claimed to be the assignee of the franchise. The assignment was attacked on the ground that it was invalid under the Constitution of the state. The court said: "The precise point

made is, that the power to supply a city with water cannot be conferred, directly or indirectly, upon a private corporation by special act."

And further: "The grant to Benrimo and his associates was also to their assigns. There can be no doubt but that they might, by the terms of the grant, sell or assign the franchise. It seems to me too plain to require argument, that the purchase by the plaintiff was strictly and directly within its powers, and contributed necessarily and directly to its objects and purposes." But the learned commissioner who delivered the opinion also said: "If any connection could be traced between the plaintiff and the passage of the special act of 1872, or it appeared that the act was obtained for the purpose of evading the constitutional inhibition, I could see how the case of San Francisco *v.* Spring Valley Waterworks, 48 Cal. 493, might apply. But, in view of the facts in this case, I cannot regard the article of the Constitution mentioned or the case last cited as having any application here." But this is not a decision that the case would apply. And if it is a concession of strength in the argument it is not a concession of conclusive strength.

We are not concerned, however, to reconcile the cases decided since 1870, and we have only mentioned them to present fully the contention of appellants. The cases prior to that time, as we have seen, made the obligation of the contract of 1868, and determined the power of the legislature to ratify it. And there seems to have been no question of this power. Besides legislative recognition, besides recognition by many acts of the city, the contract has received judicial recognition. Taxation upon the property acquired to execute it has been sustained. 49 Cal. 638. It was interpreted, and under its provisions the company denied compensation for water used in sprinkling the streets of the city. 55 Cal. 176. An ordinance was declared void imposing a license upon the company for doing business in the city. 61 Cal. 65. Its right to take more than 10 inches of water from the river was sustained in 124 Cal. 368, 57 Pac. 210, 571.

City of Los Angeles v. City Water Company, etc

The case in 51 Cal. was heard in department and in banc, and the contract received careful consideration. The judgment of the trial court was for the water company, and department 2 of the supreme court, affirming it, said:

"The court was correct in its judgment. The plaintiff had already reserved a sum to be paid by defendant for the privilege of vending water for domestic purposes, and it could not change its contract in the manner proposed. The privileges granted by the lease and the ordinance of 1868 were already vested in the defendant as strongly as they could be by a license under the ordinance of 1879. A license is a grant of permission or authority. The defendant already had permission and authority granted by ordinance and ratified by the legislature. The city cannot, during the term of the lease, of its own motion, increase the amount to be paid for the privileges granted.

"It is hardly necessary to say that the point made by the appellant, that neither the city nor the legislature can grant or alienate any of the rights of sovereignty, has no application to this case."

The court in banc, through its chief justice, approved this language, and, after quoting cases, said:

"The authorities of the city of Los Angeles, by a contract (the validity of which has not been challenged by either party) and for certain valuable considerations therein expressed, granted to the defendant's assignors the privilege of supplying the city of Los Angeles and the inhabitants thereof with fresh water for domestic purposes, with the right to receive the rents and profits thereof to their own use;"—and after citing cases to show that the exaction of the license would impair the obligation of the contract, concluded as follows:

"The principles enunciated in the foregoing cases are eminently sound and just, and are directly applicable to the case we are now considering. The city of Los Angeles, by its solemn contract and for various considerations therein stated, gave to the party under whom defendant claims the privi-

lege of introducing, distributing, and selling water to the inhabitants of that city on certain terms and conditions which defendant has complied with; and it was not within the power of the city authorities, by ordinance or otherwise, afterward to impose additional burdens as a condition to the exercise of the rights and privileges granted."

3. The provision of the contract, restraining the city from granting any other franchise, if it created an exclusive franchise, invalidated the whole contract. 4. The act of 1870, purporting to ratify the contract of 1868, is unconstitutional and void. 5. The water company has no power under its charter to collect water rates, except as prescribed by the Constitution and statutes of the state.

These contentions are dependent upon the same reasoning as the preceding one, and do not require a separate discussion.

Establishment of Water Rates by City—Whether Water Company Estopped.

6. By acquiescing in the regulations of rates ever since 1880 the company is estopped from claiming equitable relief and is guilty of laches.

There was no such acquiescence as estopped the water company from contesting the ordinance of the city. The facts are that in 1880 the city passed an ordinance to be in effect one year, establishing water rates, and passed one every year thereafter, including 1897, when the one in controversy was passed. The rates established by the ordinances were less than those adopted in 1870, and the latter are claimed to have been not higher than the rates charged in 1868. The company collected the rates established by the ordinances, except those established in 1896 and 1897. A suit was brought by the company to set aside the ordinance of 1896, and that of 1897 is assailed in the case at bar. These ordinances fixed the rates at less than they have been fixed before. The company has also every year since 1882 filed a statement with the city council, showing the names of the consumers of water, the rates paid, and the expenditures made for supplying water for the proceeding year. The company always protested against the right of the city to demand

statements, and claimed to make them solely for its information. The company also in 1882 protested against the power of the city to fix rates on any other basis than that of the contract of 1868. The city therefore cannot claim to have been deceived by the action of the company in collecting the rates established prior to 1896. They were less, it is stipulated, than those of 1870, but how much less we are not informed. It is true we are not informed how much less those fixed in 1896 and 1897 are than those of the prior years. They are less, "less than they had ever been fixed before," is the stipulation; and they will, according to the stipulation, produce more than $50,000 less revenue than those of 1870.

Acquiescence in a regulation which, all things considered, may not have been injurious, does not preclude a contest of that which is injurious. It must be remembered that the contract did not forbid all regulation, but only regulation beyond a certain limit. There was no concession of a power to go beyond that limit, but constant protest against it; and when its exercise did go beyond that limit, producing injury not balanced by other considerations, the right to restrain it would naturally be, and we think could legally be, exerted. As we have said, there was no concealment, no misleading, no injury, no change of condition, no circumstance which could invoke the doctrine of estoppel or of laches. Appellants, however, assert there was, and claim that the acquiescence of the water company was induced by the fear that the city would prevent the unlimited use of the river water,—a use beyond the 10 inches claimed to be allowed by the contract, and a use against other and proprietary rights of the city. Of the latter the record does not enable us to form a judgment. Of the former the supreme court of the state (124 Cal. 368, 57 Pac. 210, 571) has decided against the contention of the city. We approve the decision and hereafter quote its language. The appellant's inference, therefore, is without the support of anything in the record.

Immaterial Question.

7. The water rates established by the ordinance are not shown to be lower than those

charged in 1868, or, if lower, that the revenue of the company is reduced.

To sustain this contention it is claimed by appellants that there is no testimony in the record to show that the rates established in 1897 were lower than those charged in 1868. Appellants say:

"The only thing which complainants rely on to establish this fact is the recital in the report of a committee of the council appointed in 1870 for the purpose of agreeing with the water company upon a schedule of water rates to be charged, in which it stated (by the joint committee) 'that they have established water rates and charges for domestic purposes, taking as a guide, as near as can be, the charges and rates for domestic purposes charged in July, 1868. That your committee have also fixed the rates and charges for other reasonable objects and purposes, and report as follows.'"

It is urged this is not a statement that the rates fixed in 1870 were equal to those of 1868; indeed, that they may have been higher. And it is also urged there is a distinction made between rates for domestic purposes and rates for "other reasonable objects and purposes," which may mean not domestic purposes, and as to these it does not appear upon what they were based.

We are not disposed to dwell long on these claims. It is incredible that the city should have demanded statements from the company yearly, have passed ordinances yearly, and provoked and endured an expensive litigation to establish rates higher than or the same as those which already existed. If statements and ordinances were necessary in fulfilment of the duty of the city under the Constitution of the state, neither controversy nor litigation was necessary, nor would either have ensued.

It is urged under this head that it is not shown that the income of the water company is less under the rates fixed by the city than under those of 1868. The showing would be irrelevant. The contract concerns rates, not income,

and the power of the city over them under the contract.

Right to Equitable Relief—Whether Ordinance Cloud upon Title.

8. If the ordinance is invalid, it is void on its face, and there is, therefore, no cloud on the company's title.

The contention is that "if the contract of 1868 is valid, and the ordinance of 1897 reduces the income of the company below that which it should receive, the ordinance is void on its face as being in conflict with the Federal Constitution, and is no cloud on complainants' title."

It is hence deduced that the water company has adequate legal remedies, and cannot resort to an equitable one.

We concur with the learned trial judge that the ordinance is not void on its face. As said by him:

"In the case at bar, however, the ordinance upon its face is valid, and its invalidity appears only when considered in connection with the contract of July the 22d, 1868, and evidence showing what the water rates were at that date. While the court takes judicial notice of the ratifying act of April 2, 1870, still, since the provisions of the contract of July the 22d, 1868, are not embodied in said act, I am not sure that said provisions are matters of judicial knowledge, although such seems to be the ruling of the court (one of the justices dissenting) in Brady *v.* Page, 59 Cal. 52. Conceding, however, that the court will take judicial notice of all the provisions of said contract, still the one in question simply provides that water rates shall not be reduced below the rates then charged, without indicating what those rates were, and therefore the invalidity of the ordinance appears, not upon its face, but only in connection with extraneous evidence of what the rates were in July, 1868, and for this reason complainants have adduced that evidence in the present case."

And further:

The complainants must either submit to the terms of the ordinance or incur unusually onerous expenditures. It is reasonably certain that if, with the ordinance standing, they were to undertake the collection of rates in excess of those

prescribed in the ordinance, they would be resisted at every point by the consumers of water, and thus be driven to innumerable actions at law. Besides, should they, in any instance, succeed in collecting, without an action, a higher rate than the ordinance prescribes, it is equally certain that they would thereby bring upon themselves protracted and heavy litigation, having for its object forfeiture of their entire system of works. Surely these injuries are irreparable, and actions at law, so far from being adequate to the exigencies of the situation, are, as complainants in their brief forcibly put it, mere mockeries of a remedy."

9. The company violated the contract by taking water from the Los Angeles river, and therefore is not entitled to specific performance.

Excessive Taking of Water—Estoppel of City to Object.

In reply to this contention, we may adopt the language of the supreme court of the state of California, used on behalf of the court by MR. JUSTICE MCFARLAND, in Los Angeles *v.* Los Angeles City Water Co., 124 Cal. 377, 57 Pac. 213.

The contract of 1868 and the right of the water company to take water from the river were considered and decided. The learned justice said:

"Before considering the main questions in the case, it is proper here to notice a preliminary point made by the city, and somewhat insisted on; to wit: That the only quantity of the water of the Los Angeles river to which the water company is entitled under the contract is 10 inches under a 4-inch pressure. This contention cannot be maintained. The words of the contract on this subject are simply that the company shall not take from the river 'more than 10 inches of water without the previous consent' of the city; there is nothing in the contract about '4-inch pressure,' nor is there any intimation as to what the parties meant by '10 inches' of water. But, looking at the context and the subject-matter of the contract, it is quite evident that the parties did not mean only 10 inches under a 4-inch pressure. If that had been the

meaning, there would have been no sense in the other important covenants. At the time of the contract it would have taken many times 10 inches under a 4-inch pressure to furnish water for domestic purposes to even the few thousand people who were then inhabitants of the city; and much more than that amount was necessary to supply free water under the contract; and a solemn covenant to supply a growing city with sufficient water for domestic and municipal purposes for thirty years from a flow of 10 inches under a 4-inch pressure would have been absurd. The company, immediately after the date of the contract, commenced to use an amount of water greatly in excess of 10 inches under a 4-inch pressure; soon after the execution of the contract the company was using 300 inches under a 4-inch pressure, and from that to the present time they have been using, with the knowledge and consent of the city, from 300 to 700 inches so measured. Therefore, whatever (if anything) was meant by the simple words '10 inches,' the contract was immediately, and has been continuously, construed by the action of the parties as meaning more than 10 inches measured under a 4-inch pressure. There is no pretense that the city ever objected to the use of this water by the water company until 1896, when an ordinance was passed by the city government undertaking to withdraw the city's consent to the taking of more than 10 inches from the river. It is difficult to imagine how this ordinance was passed seriously; for if the water company had been prevented from taking from the river at that time more than 10 inches of water under a 4-inch pressure, there certainly would have been a water famine in the city, for the city had no works of its own and no means whatever for supplying water for either domestic or municipal purposes. But the city, having allowed the water company for nearly thirty years to divert the quantity of water above mentioned, and to expend vast sums of money upon the faith of a continuance of the right to take said water, could not withdraw its consent within the period of the contract."

The learned justice then quoted and approved the following remarks of the circuit court in the case at bar:

" 'If it be conceded, as claimed by defendants (which, however, I do not decide) that the provision of the contract, limiting the quantity of the water to be taken from the river without previous consent of the city, is sufficiently certain for enforcement, or, more specially, that said quantity is 10 inches measured under a 4-inch pressure, still, the consent of the city to the taking of a larger quantity, once given, cannot be withdrawn during the life of the contract, for the reason that large expenditures have been made by complainants in reliance upon such consent.' The court cites as authorities to the point: Rhodes *v.* Otis, 33 Ala. 600, 73 Am. Dec. 439; Woodbury *v.* Parshley, 7 N. H. 237, 26 Am. Dec. 739; Lacy *v.* Arnett, 33 Pa. 169; Russell *v.* Hubbard, 59 Ill. 339; Beall *v.* Marietta Paper Mill Co., 45 Ga. 33; Veghte *v.* Raritan Water Power Co., 19 N. J. Eq. 153; Williamston & T. R. Co. *v.* Battle, 66 N. C. 546; Flickinger *v.* Shaw, 87 Cal. 126, 11 L. R. A. 134, 25 Pac. 268; Grimshaw *v.* Belcher, 88 Cal. 217, 26 Pac. 84; Smith *v.* Green, 109 Cal. 228, 41 Pac. 1022, all of which sustain the point."

Decree affirmed.

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STATE *ex rel.* CITY OF ST. PAUL

*v.*

ST. PAUL CITY RY. CO.

(*Supreme Court of Minnesota, Dec. 15, 1899.*)

**Municipal Control of Streets—Extension of Street Car Service—Construction of Ordinance.**—A municipality cannot abdicate or barter away, at least without express legislative authority, its governmental powers conferred upon it for public purposes. Hence any authority to use the streets granted to a street-railway company must be construed as being subject to the general police power of the municipality over the public streets. Section 18 of Ordinance 1227

City of St. Paul *v.* St. Paul City R. Co

of the city of St. Paul, known as the "General Electric Ordinance," construed, and *held*, that the power therein reserved to the common council to order the St. Paul City Railway Company to extend any existing or future lines of its railway is not limited to extensions on streets or parts of streets not provided with any car service, but authorizes the extension of the car service of one line to or into the business or central part of the city, over streets or parts of streets upon which there is an existing track upon which the cars of another line are already operated.

(Syllabus by the Court.)

APPEAL by relator from Ramsey county district court *Reversed.*

*Jas. E. Markham* and *Carl Taylor*, for appellant.

*Munn & Thygeson*, for respondent.

MITCHELL, J. On September 20, 1889, the city of St. Paul passed Ordinance No. 1227, commonly known as the "General Electric Ordinance," by which the defendant was authorized to construct and maintain on the streets of the city 16 different lines of street railway, all of which converged in or towards the central or business portion of the city. These, when taken together, made a complete system, running to and from all parts of the city, and were evidently considered sufficient to accommodate the then present needs of the public. But as it was anticipated that, by the reason of the future growth of the city or other causes, the needs of the public might require additional or different accommodations, it was provided by section 18 of the ordinance that "the common council reserves and shall have the right, at any time, and from time to time, after January 1, 1892, to order the construction and completion, by said St. Paul City Railway Company, of any new lines of street railway or the extension of any present or future lines of railway upon any and all streets in the city of St. Paul upon which sewers shall have been constructed and in operation within one year after such orders are made: provided, that when new lines or extensions are constructed all the provisions of the ordinance shall apply thereto." The City Railway Company accepted the provisions of this ordinance, and constructed and are

operating all the lines therein provided for. Among the lines provided for was one commencing on Fifth street at Wacouta street; thence, on Fifth street, to Wabasha street; thence, on Wabasha street, to University avenue; and thence, on University avenue, to the west limits of the city. This line was known as the "University Avenue Line." This is the line upon which the University avenue interurban cars are operated, except as hereinafter stated. On May 20, 1890, the common council passed Ordinance No.1339, amendatory of, or supplemental to, Ordinance No. 1227, authorizing the City Railway Company to construct and operate a single track on Eighth street, from Robert street to Wabasha street, to be used by the railway company as a "loop," upon which all the cars entering that portion of the city should be run, excepting under circumstances which should render running thereon impracticable. Of course, to render this line available as a "loop," it was necessary to use, in connection with and as a part of it, the existing line on Robert street. The City Railway accepted the provisions of this supplemental ordinance, and built the line on Eighth street, and since that time, instead of operating their University avenue interurban cars on Fifth street down to Wacouta street, run them around the Robert and Eighth street "loop." On May 16, 1893, the city council passed still another amendatory ordinance, No. 1686, by which the City Railway Company was authorized to change the East Seventh street line into an electric line, and to connect it with the West Seventh street line, and further providing that the cars operated on the Maria avenue line, provided for in Ordinance No. 1227, should be thereafter run on East Seventh street as far west as Robert street. The railway company accepted the provisions of this ordinance, and made the authorized changes, so that the Seventh street cars are now operated as a continuous line from Ft. Snelling to Duluth avenue, in the eastern part of the city, and the Maria avenue cars are run down Seventh street to Robert street. By this same ordinance, the defendant company was required to construct

and operate a double-track line of railway, beginning at the intersection of Rice street and Como avenue; thence, along Como avenue, to its intersection with Front street; thence along Front street, to its intersection with Chatsworth street; thence, along Chatsworth street, to its intersection with Van Slyck avenue; thence, along Van Slyck avenue, to Como Park. This is what is known as the "Como Park Line." The ordinance provided that the cars operated over this line should be run "to and from the central portion of the city." The Como avenue line, ever since its construction, has been operated over the route above specified to Wabasha street; and thence, on Wabasha street, to Fifth street; thence, down Fifth street, to Robert street; and thence, on Robert and Eighth streets, around the Eighth street "loop," back to Wabasha street. On May 8, 1897, the city council passed still another ordinance, No. 1925, by which the defendant was ordered and directed, within one year, to change and extend the operation of its University avenue or Interurban and its Como avenue lines of cars by running them easterly, on Fifth street, to Broadway street (a distance of five blocks east of Robert street); thence north, on Broadway, to Seventh street (a distance of three blocks); thence west on Seventh street, to Wabasha. The effect of this was to extend the service of these two lines five blocks further east, and to make the "loop" on Broadway aud Seventh streets, instead of Robert and Eighth streets, as before. These portions of Fifth, Broadway, and Seventh streets were already provided with car service by other lines, and the proposed change and extension of the service of the Interurban and Como lines would not require the constructiou of any new track. It is conceded that sewers had been already constructed upon all of these streets. The defendant having refused to comply with the provisions of this ordinance, this proceeding was brought, at the relation of the city, to compel it to do so. The defendant claimed that the ordinance was void, because it required it to do what it was not required to do under the general electric ordinance, No. 1227, and not within the

power reserved to the city council under section 18 of that ordinance. The trial court sustained this contention, and held that Ordinance No. 1925 was void.

The trial seems to have been conducted upon the theory that Ordinance No. 1227 was to be construed precisely as if it was a contract between two private individuals. It is but fair to say that counsel for the city was largely responsible for this. This, however, is altogether a too narrow, and even erroneous, view to take of the case. We shall assume, without discussion, that Ordinance No. 1227 contains a valid contract between the city and the street-railway company, the obligation of which the former cannot impair. But this proposition is subject to the following qualification: Among the governmental powers vested by the city charter in its common council is "the care, supervision, and control of all public highways, bridges, streets," etc. Without attempting to define the extent or limits of the power thus granted, it unquestionably gives the common council authority to enact such police regulations regarding the use of the streets as are necessary for the safe and convenient enjoyment of them by the public for the purposes for which they are designed. It is fundamental that a municipality cannot, at least without express legislative authority, deprive itself by contract of any governmental powers conferred upon it for public purposes. Flynn. *v.* Water Co. (Minn.), 77 N. W. 38. Hence any authority to use the streets granted to the defendant must be construed as being subject to the police power of the city over the streets, whatever may be the language of the grant. For example, if, by reason of increased traffic on the streets prescribed for the construction and operation of the "loop" or for any other reason, the use of those streets for that purpose became inconsistent with the convenient use of the streets by the public, or a menace to the safety of the public, it would, in our opinion, be unquestionably within the police power of the city to enact an ordinance requiring the loop to be changed to some other reasonable location. In short, while a municipality cannot impair the obligation of

its contract under the guise of exercising its police power, yet it cannot surrender or barter away its police powers under the guise of making a contract.

Whether Ordinance 1925 was enacted in the exercise of the "police power," strictly so called, or to secure more and better service for the traveling public by the extension of the Interurban and Como avenue lines, and, if the former, whether it was or was not a reasonable exercise of the police power, does not appear. Of course, if the ordinance was enacted in the exercise of the police power, it will be presumed to be reasonable and valid until the contrary is made to appear. Both of the counsel seem to have tried the case upon the assumption that the object of the ordinance was to extend the service on the Interurban and Como avenue lines, under the authority reserved to the city council by section 18 of Ordinance 1227. The court also decided the case upon this theory. But, even on this assumption, in our judgment, the facts did not justify the conclusion at which the court arrived.

The position taken by the court below, and by the council for the defendant in this court, was that the power reserved to the common council in section 18 was only the right to compel the construction of new lines, or the extension of present or future lines, on streets or portions of streets not already provided with street-car service, and not the right to compel the extension of the service of the cars of one line over or along streets or portions of streets upon which other lines are already operated. In support of this view, especial stress is laid upon the particular words and expressions used in the section, such as "the construction and completion," and "shall be constructed and in operation"; also upon the fact that the ordinance provides for a complete system of transfers from one line to another, without additional cost, and requires the cars on all lines to be operated with sufficient frequency to accommodate the traveling public. With all due deference to the learned court and counsel, we think they attach altogether too much weight to these facts. The right

of transfer from one line to another, without extra charge, is, as every one knows, not the equivalent of a continuous ride on the same car to the place of destination. Again, while it is probably true that what was more particularly in mind in framing this section was cases where public convenience would require car service on streets or parts of streets not already provided with any car service at all, and hence where the extension of the service would involve the construction of a track, yet there is nothing in the section which limits its operation to such cases. A railway track is only a means to an end. What is needed is not merely the track, but the service. That is what the section was designed to secure. There is nothing in it limiting the right to require an extension to the outer end of an existing line. Public needs may require it at either end. The plan or scheme of street-railway systems is generally to furnish the means of communication between the outlying portions of a city and its business or central portion. This was evidently the scheme of the system of lines provided for in Ordinance No. 1227. As the business portion of a city increases in area, or its business center shifts, as is often the case, there arises a necessity for extending the street-car lines inwardly, so as to reach or penetrate it. If there had been no existing line operated on Fifth street between Robert street and Broadway street, or upon Broadway between Fifth and Seventh streets, or on Seventh from Broadway to Wabasha street, we do not see how it could be successfully claimed that the extensions required by the common council were not within the provisions of section 18. Why should it be held not within them merely because there is already a railway track on those streets, over which the extended service is to be furnished, and hence the defendant not required to incur the expense of building one? It seems to us that it is a case for the application of the axiom that the whole includes all its parts.

But it is suggested that, if this extension can be required, there is no limit to the power of the common council in the matter of extending the service of one line over tracks used

by any other line; that, on the same ground, it would have authority to require the Interurban and Como avenue cars to be run over the Seventh street line, out to the eastern limits of the city, or over to West St. Paul. This by no means follows. There is reason in all things. As already suggested, Ordinance 1227 contemplates a system of lines converging towards, or terminating in, the central or business portion of the city, so as to furnish a means of communication between it and the outlying portions of the city. How far and to what distance any of these lines shall be extended into this business or central portion of the city is, and must of necessity be, a matter largely addressed to the judgment and discretion of the common council. But if it was attempted to require the extension of the service of any line over a track on which another line was operated, entirely through the central portion of the city, out into a suburban district on the opposite side of the city, we apprehend that, unless there were some very exceptional circumstances creating a necessity for it, a court would very unhesitatingly hold that the common council had no authority, under either section 18 or the general police power, to require this to be done. There is nothing in the record tending to prove that this is any such case. Our conclusion is that the order appealed from should be reserved, and the case remanded for a new trial. It is so ordered.

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KNAPP, STOUT & CO. COMPANY

*v.*

CITY OF ST. LOUIS *et al.*

(*Supreme Court of Missouri, May 15, 1900.*)

**Vacation of Street—Whether Property Abuts—Right to Enjoin.***—A lot on the north side of S. street fronting on and opposite the northern terminus of M. street, which intersects the south side of S.

*See notes at end of case.

Knapp, Stout & Co. *v.* St. Louis

street, does not abut on M. street; and, therefore, the owner of the lot is not entitled to injunctive relief in case of the vacation of M. street.

**Same—Municipal Power.***—In the absence of fraud, the action of a city in exercising its power to vacate a street will not be controlled or reviewed by the courts.

**Same—Private Use—Fraud.**—The fact that the vacation of a street was for the purpose of giving a private firm the exclusive use and possession of the vacated portion is no evidence of fraud.

APPEAL by plaintiff from St. Louis circuit court. *Affirmed.*

*Lubke & Muench*, for appellant.

*B. Schnurmacher* and *Chas. C. Allen*, for appellee city of St. Louis.

*McKeighan, Barclay & Watts*, for appellee Mallinckrodt Chemical Works.

ROBINSON, J. This is a proceeding in equity begun in the circuit court of the city of St. Louis on November 7, 1896, to invalidate an ordinance passed on the 4th day of April, 1891, by the city of St. Louis, vacating a part of Main or First street between Mallinckrodt and Salisbury streets for a distance of one block, and to enjoin the defendants from interfering with said portion of said street, and to require them to remove therefrom certain improvements placed thereon since the passage and approval of the ordinance in question. The petition, omitting the formal parts, is as follows: "The plaintiff, the Knapp, Stout & Co. Company, is a corporation existing under the laws of the state of Wisconsin, and for many years last past has owned, and now still does own and possess, among other parcels of real estate in said city of St. Louis, a lot 60 feet in width, lying on the north side of Salisbury street, at a point where Main street, hereinafter named, runs into or intersects Salisbury street, so that said lot fronts also on Main street, as hereinafter mentioned, at its northern terminus. That defendant the city of St. Louis is a municipal corporation existing under the laws of

Case Stated.

*See notes at end of case.

Missouri; its charter having been adopted October 22, 1876, and being a public act. That defendant the Mallinckrodt Chemical Works is also a corporation duly incorporated and existing as such, and that one Edward Mallinckrodt is the president of said works, and at the time of the passage of the ordinance hereinafter mentioned, and while the same was pending before the municipal assembly of said city, the said Mallinckrodt was authorized to act for and on behalf of said Mallinckrodt Chemical Works in the matters hereinafter alleged against said works. That for many years prior to October 22, 1876, there existed, and now still exists, in said city, an open, public street or highway, of the width of about 60 feet, extending from about Dorcas street, in the southern suburbs of said city, northwardly to Salisbury street, a distance of more than 75 blocks, or about 5 miles. That said street is called 'Main Street' or 'First Street,' and in its course follows the meanderings of the Mississippi river, and that said street has during all said time been used by the public as an open and complete public street and highway. That the owners of the ground fronting said street constructed their buildings along the eastern and western lines of said street, treating the same as a public street, and that the defendant the city of St Louis has during all said time, and until the happening of the grievances hereinafter complained of, used and treated said street as one continuous street, extending between the points aforesaid and the distance aforesaid. That defendant the city of St. Louis at the times hereinafter mentioned held, and now still holds, the title to said street, as a continuous street extending between the points aforesaid, in trust for the use of the public of said city of St. Louis, and especially in trust for the use of the owners of property abutting or adjoining the same, including the plaintiff, hereinbefore named, by reason of the plaintiff's ownership of said tract of ground fronting on said Main street, hereinbefore more particularly described. That heretofore the municipal assembly of defendant, the city of St. Louis, passed an ordinance, numbered 16,093, which was

approved by the mayor of said city April 4, 1891, and is in words and figures as follows: '16,093. An ordinance for the vacation of First street between Mallinckrodt and Salisbury streets. Be it ordained by the municipal assembly of the city of St. Louis as follows: Section 1. First street between Mallinckrodt and Salisbury streets is hereby vacated. Approved April 4, 1891.' That by said ordinance the defendant the city of St. Louis does attempt to break the continuity of said Main street, by vacating or attempting to vacate one block thereof, extending from Mallinckrodt to Salisbury street, a distance of more than 300 feet, and a width of about 60 feet. That the ordinance aforesaid was not passed or approved for any public purpose, but was passed and approved at the instance of defendant the Mallinckrodt Chemical Works, acting therein by its president, Edward Mallinckrodt. That the defendant the Mallinckrodt Chemical Works is a private corporation, existing solely for the private gain of the shareholders thereof, and engaged in the business of manufacturing and selling chemicals and like commodities. That the sole and only purpose of said ordinance hereinbefore set out, passed and approved as aforesaid, was and is to give to said defendant the Mallinckrodt Chemical Works the exclusive use and possession of said part of Main street lying between Mallinckrodt and Salisbury streets, and to the end that said Mallinckrodt Chemical Works may increase its capacity and the profits of its shareholders. That said part of said Main street lying between Mallinckrodt and Salisbury streets, and so by said ordinance attempted to be ceded or given to said Mallinckrodt Chemical Works, would be, if private property, of the value of upwards of $20,000. That by and under color of said ordinance said Mallinckrodt Chemical Works has taken possession of said part of Main street lying between Mallinckrodt and Salisbury streets, is excluding the plaintiff and the public therefrom, and has erected permanent obstructions thereon, constituting in law a nuisance upon said highway. That the said ordinance of the municipal assembly of the defendant the city of St. Louis, numbered

16,093, hereinbefore set out, was passed by said assembly and approved by the mayor of said city without any legal warrant or authority whatsoever therefor. That the attempt to destroy said part of said Main street mentioned in said ordinance, and to devote the same to the private use of the defendant the Mallinckrodt Chemical Works, is a violation by said defendant the city of St. Louis of its duties as trustee holding the title to said street, as hereinbefore mentioned, and that the occupation and use of said part of said street by defendant the Mallinckrodt Chemical Works are wholly illegal. That the plaintiff has no adequate remedy at law, either for the recovery of damages or otherwise, to prevent or to be compensated for the injury already done them and which may hereafter accrue to them because of the attempted destruction of the continuity of said Main Street, and the appropriation by defendant the Mallinckrodt Chemical Works of said part thereof, and that the damages of the plaintiff in the premises are irreparable. That plaintiff, together with certain other parties, on May 2, 1891, instituted in this court against defendants an action setting forth the foregoing facts, and praying the same relief as is hereinafter prayed, and that said former suit was dismissed, without prejudice to plaintiff or its rights, on December 8, 1891. Wherefore the plaintiff now prays the court, as a court of equity, for a decree declaring as wholly null and void the said ordinance numbered 16,093, approved April 4, 1891, entitled 'An ordinance for the vacation of First street between Mallinckrodt and Salisbury streets,' in so far as said ordinance affects Main or First street between Mallinckrodt and Salisbury streets, enjoining and restraining defendants, their agents, servants, successors, assigns, and all who may come under them hereafter, from in any manner interfering with said part of Main street between Mallinckrodt and Salisbury streets under or by color of said ordniance, and also that upon the final hearing of this cause the court will, by its decree, require and enjoin upon defendants, their successors, assigns, agents, servants, and all who may come under them in the premises, the duty of

removing from said part of said Main street any and all obstructions which defendants may now have, or which they, or any one under them, may hereafter place upon said part of said Main street, so that upon the final hearing of this cause this court will by its decree secure to the plaintiff and the public of said city, and allpersons interested, the restoration of said part of said Main street as the same existed at the date of the passage and approval of the ordinance aforesaid. And the plaintiff also prays against the defendants judgment for their costs, and for such other and further relief as to the court may seem meet," etc. The defendants demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. These demurrers were sustained by the circuit court, and plaintiff excepted, and elected to stand on its petition, and declined to plead further. Thereupon the court below entered a final judgment for defendants, dismissing plaintiff's bill, and plaintiff, after the usual motion for a new trial, appealed.

The defendants challenged the sufficiency of the petition, contending that on the facts therein stated no right to injunctive relief or a decree annulling the ordinance in question is disclosed. The only question, then, presented by this appeal, is whether the court below erred in sustaining defendant's demurrer to the petition. Stripped of conclusions of law and averments of immaterial facts, the truth of which is not admitted by the demurrer, the material allegations in the petition, in substance, are, as contended by counsel for defendants, "that on and for many years prior to April 1, 1891, Main or First street was a public highway in the city of St. Louis, the northern end of which terminated at Salisbury street, opposite a lot of ground owned by the plaintiff; that on April 1st the city of St. Louis, instigated thereto by the city's co-defendant, a private corporation, passed an ordinance vacating for a distance of one block all that portion of Main or First street south of plaintiff's premises; that the effect of the passage of said ordinance was to give the defendant chemical works the exclusive use of that portion of the street so vacated;

and that the latter company is still exercising such use, and has erected permanent obstructions thereon." The allegations in the petition that the ordinance in question was passed "without any legal warrant or authority therefor," that the passage of said ordinance was "a violation by the city of its duties as trustee," that "the use by the chemical company of the vacated portions of the street is wholly illegal," that "plaintiff has no adequate remedy at law," and that "the damages of plaintiff are irreparable," are merely conclusions of law, and not averments of facts, and, as such, are not admitted by the demurrer. They are but the necessary conclusions which the court must draw from the averments of facts which, if properly made and proven, would warrant the decree sought herein. To permit the pleader to say that the ordinance in question was passed "without legal warrant or authority therefor," or that the passage of said ordinance was "a violation by the city of its duty as trustee," etc., without specifying what the city did, and the how and manner of its procedure, the necessity for pleading facts must be disregarded, and the office of the court must be ignored, and the pleader's judgment substituted therefor. Under our practice act the pleader is required to make a simple statement of the facts constituting his grievance, to which he then prays an application of the law,—not his conclusion from those facts, or his judgment upon their result. To entitle the plaintiff to any special relief, however, it is essential to show that it is an abutting property owner. While the petition alleges that the plaintiff's property fronts on Main street, still it is averred that the lot in question is on the north side of Salisbury street. The averments of the petition are that the vacated portion of Main street is south of Salisbury street, so that it may be said to affirmatively appear that plaintiff's property did not abut upon Main street. From the allegations of the petition, it appears that, before the passage of the vacating ordinance, Main street terminated south of plaintiff's property, and that the vacated portion of Main street only extended to the south line of Salisbury street. From this it must follow that

plaintiff has failed to show that its property abuts on the vacated portion of Main street.

In Knapp, Stout & Co. Company *v.* City of St. Louis (not yet officially reported), 55 S. W. 104, this identical question, by the same plaintiff, regarding the same street, in part, was directly before division No. 2; and in an opinion by GANTT, C. J., it was there pointed out that, to entitle the adjoining proprietors to injunctive relief, it was necessary to allege that such proprietors owned property fronting or abutting on a portion of the vacated street. To the same effect are the cases of Glasgow *v.* City of St. Louis, 107 Mo. 198, 37 Am. & Eng. Corp. Cas. 248, 17 S. W. 743; Rude *v.* City of St. Louis, 93 Mo. 408, 6 S. W. 257; and Fairchild *v.* City of St. Louis, 97 Mo. 85, 11 S. W. 60. In this state the principle is also well established that, in the absence of fraud (and the petition filed herein, as will be seen, makes no allegation of fraud), the passage of an ordinance such as the one in question comes within the legislative power expressly delegated to the city by its charter,—to vacate streets and alleys,—and that power will not be controlled or reviewed by the courts. The question was quite fully considered by this division in Glasgow *v.* City of St. Louis, 107 Mo. 198, 17 S. W. 743. In that case Glasgow and others, abutting property owners, instituted proceedings against the city of St. Louis and the Shickle, Harrison & Howard Iron Company, a corporation, to enjoin them from carrying into execution the provisions of an ordinance of said city vacating that part of Poplar street between Twelfth and Fourteenth streets, the abutting property on each side of which was owned by the iron company. It was averred in the petition filed in that case that the officers and agents of the city combined with the iron company for the purpose of vacating the street and converting it to the private use of the iron company, and that the ordinance was passed in pursuance of such conspiracy. The court in

Vacation of Street—Whether Property Abuts—Right to Enjoin.

Same—Municipal Power.

that case, after a full review of the authorities and an elaborate discussion of the petition, said: "Considerable evidence was reviewed by the trial court, showing why and under what circumstances this vacating ordinance was passed. The rule of law is well established that the courts will not inquire into the motives of the legislature in enacting the law, even when fraud and corruption are alleged. Cooley, Const. Lim. (5th Ed.) 225. But the rule is somewhat relaxed as to municipal bodies. Speaking of such bodies, it is said: 'We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, may be impeached for fraud at the instance of persons injured thereby.' 1 Dill. Mun. Corp. (4th Ed.) § 311." After commenting on the evidence as to the purpose for which the ordinance was passed, the opinion proceeds: "Whether a street should be kept open or vacated was purely a matter of expediency, and this was a question for the municipal assembly, and not for the courts, to decide. * * * The charter of the city of St. Louis gives the mayor and assembly power, by ordinance, to establish, vacate, alter, and widen all streets, sidewalks, alleys, etc. Under such power the municipal assembly may vacate a street or part of a street without any judicial determination. And such a power, when exercised with due regard to individual rights, will not be restrained at the instance of a property owner claming that he is interested in keeping open the streets to the public." Again in the same opinion it is further said: "The city has the power to vacate streets, and in the exercise of its power it can make no difference whether the public acquire the particular street by condemnation or dedication. In either case it is for the municipal assembly to say whether the public interests require the street to be kept open. It is very true that the question whether a certain use is public or private is a question for the courts to determine, but it is for the assembly to say whether a given street shall be opened or vacated." In speaking of the point under consideration, Elliot, in his work on Roads and Streets (page 664), says: "Whether it

is expedient to discontinue a highway is a question for legislative decision, and when the authority to discontinue is delegated to local officers, and no restrictions are placed upon its exercise, the officers are vested with a very broad discretion, and unless this discretion has been abused the courts cannot interfere. This is in accordance with the general rule that, where officers are invested with discretionary power, courts will not substitute their judgments for that of the officers invested by law with the right to decide upon the interest or expediency of doing a designated act." In Heinrich *v.* City of St. Louis, 125 Mo. 424, 28 S. W. 626, it was expressly decided that the city of St. Louis had the power to vacate streets and alleys, and that it was for the municipal assembly, and not the courts, to say when that power was to be exercised. In Soon Hing *v.* Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145,—a case involving the validity of an ordinance of the city of San Francisco regarding laundries,—that court, through MR. JUSTICE FIELD, said: "The petition alleges that it [the ordinance in question] was adopted owing to a feeling of antipathy and hatred prevailing in the city and county of San Francisco against the subjects of the emperor of China, residents therein, and for the purpose of compelling those engaged in the laundry business to abandon this lawful avocation and residence there, and not for any sanitary, police, or other legitimate purpose. There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motive of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to accomplish that which follows as a natural and reasonable effect of this enact-

ment. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating the hearts of men and ascertaining the truth, preclude all such inquiries, as impracticable and futile." In the more recent case, in our own state, of Christian *v.* City of St. Louis, 127 Mo. 109, 29 S. W. 996, where it was sought to enjoin the closing of an alley vacated by an ordinance of the city of St. Louis, this court said: "The right of plaintiff as an abutting owner of the alley in the rear of his lot is a property right. * * * On the other hand, the right of the city to vacate the alley is expressly conferred by the charter. This power to vacate must be exercised subject to the constitutional provisions that private property shall not be taken or damaged for public use without just compensation. That plaintiff has a clear legal remedy is without doubt." The court, however, in so asserting itself, held that the plaintiff was not entitled to an injunction against the city to enjoin the closing of the alley; remarking in the concluding paragraph of its opinion that "the courts of law can afford him an adequate remedy for his damages." In the Knapp, Stout & Co. Company Case, above mentioned, the relief sought was based upon the fact that the vacating ordinance was not passed for public purposes; that its sole purpose was to give the St. Louis Stamping Company the vacated street. That case, in all its essential features, is identical with this case; and there, as here, it appeared that the vacating of the street would result in enabling the St. Louis Stamping Company to extend its factory over the vacated portion of the street. The conclusion was, however, there reached by the court that such use of the vacated street was no evidence of fraud, and we concur in the conclusion announced therein. It follows, therefore, that the city has ample power to vacate the portion of the street in question; and as there is no sufficient averment of fraud to overthrow the presumption that, in passing the vacating ordi-

Same—Private Use—Fraud.

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nance, the city was actuated by proper motives, the circuit court committed no error in sustaining the demurrer upon that ground. The judgment is therefore affirmed. All concur, except MARSHALL, J., not sitting, having been of counsel.

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NOTES.

**Vacation of Streets—Who May Question Right.**—The right to appeal from the decision of the commissioners of highways vacating a road is limited to the owners of land adjoining that part of the road vacated, although the statute provides that any person interested in the decision of the commissioners may appeal. Bloomington *v.* Quinn (Ill.), 33 Am. & Eng. Corp. Cas. 463. Overruling Whitmer *v.* Commissioners of Highways, 96 Ill. 289.

Persons who do not own property on a street which it is proposed to vacate, and who merely suffered inconvenience in common with all other persons, are not entitled to an injunction to restrain the enforcement of an ordinance vacating the street. Nor is their property damaged within the meaning of the constitutional provision declaring that private property shall not be damaged for public use without just compensation. Glasgow *v.* City of St. Louis, 107 Mo. 198, 37 Am. & Eng. Corp. Cas. 248.

The fact, that the owner of an adjacent lot objects to the vacation of the street does not give the owner of land outside of the city boundaries a sufficient cause of action for enjoining the proceedings of the city in the proposed vacation of the street. House *v.* Greensburg, 93 Ind. 533, 6 Am. & Eng. Corp. Cas. 117.

The action of the authorities of a municipality in discontinuing a street is not subject to review at the instance of one not owning or occupying land abutting on such street. Symons *v.* San Francisco, 115 Cal. 558, 47 Pac. 453. See also Dantzer *v.* Indianapolis W. Ry. Co., 141 Ind. 604, 34 L. R. A. 769. See, *contra*, *In re* Coe, 44 N. Y. Supp. 910.

**Same—Private Use—Fraud.**—Proceedings, under proper statutory authority, by a municipal corporation to vacate a street are not invalidated by the fact that the vacation was ordered at the instance and for the benefit of a private corporation. Meyer *v.* Teutopolis, 131 Ill. 552, 28 Am. & Eng. Corp. Cas. 239.

The fact that one of the reasons for vacating that portion of the street was to accommodate a person over whose lands the vacated portion ran does not invalidate the ordinances. State *v.* City of Elizabeth (N. J.), 41 Am. & Eng. Corp. Cas. 456.

**Same — Municipal Power — Review.**—A municipal corporation,

under the authority conferred in its charter "to locate and establish streets and alleys and vacate the same," may rightfully and constitutionally order the vacation of a street; and this power, when discreetly exercised and with due regard for individual rights, will not be restrained at the instance of a citizen claiming that, as a landowner, he is interested in keeping open the streets dedicated to the public. Gray *v.* Iowa Land Co., 26 Iowa 387.

Whether a city street should be kept open or vacated is purely a matter of expediency, and is a question for the municipal authorities, and in the absence of any evidence showing fraud, or that the ordinance vacating a street is unreasonable, the courts will not interfere. Glasgow *v.* City of St. Louis, 107 Mo. 198, 37 Am. & Eng. Corp. Cas. 248.

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STORK

*v.*

CITY OF PHILADELPHIA.

(*Supreme Court of Pennsylvania, March 12, 1900.*)

**Eminent Domain—Deprivation of Lateral Support—Constitutional Provision—Liability of City.***—Under the constitutional provision that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements," there can be no recovery against a city for injury to non-abutting property by reason of the manner in which a street improvement was made, and not the result of the improvement itself, such as the deprivation of land with buildings on it of its lateral support which could have been avoided by due care.

**Estoppel.**—In an action for such an injury, the contention that the city was estopped from setting up the defense, that the injury was not the necessary result of an act of eminent domain, by the fact that plaintiff appeared before the viewers in response to notice, was without merit, as no notice from the viewers could give them any authority to pass on a question of liability which the law had not placed within their jurisdiction.

APPEAL by city from Philadelphia county court of common pleas. *Reversed.*

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*See note at end of case.

Stork *v.* City of Philadelphia

*John L. Kinsey, City Sol.*, and *John H. Maurer* and *Francis L. Wayland, Asst. City Sols.*, for appellant.

*Charles L. Brown* and *John C. Bell*, for appellee.

Case Stated.

MITCHELL, J. In the construction of a public improvement, known as the "Subway," for the avoidance of grade crossings of the streets of the city and the tracks of the Reading Railroad, the grade of Pennsylvania avenue was lowered, and it became necessary to build a retaining wall to support the soil at the sides. Plaintiff was the owner of a house which fronted on Eighteenth street. Neither it nor the lot on which it was built abutted at any point on Pennsylvania avenue, but the lot extended back towards the avenue, so that the nearest corner was 4 feet at the bottom, and 12 feet at the top, from the excavation made to receive the retaining wall. During the construction the house next to plaintiff's, and between it and Pennsylvania avenue, was torn down; and some months later the plaintiff's house settled, the walls cracked, and had to be taken down. For this injury claim was made before the jury of view to assess damages for the construction of the subway, and on appeal to the common pleas the city defended on the ground that as the property did not abut on the line of the avenue, and the injury was not the result of the improvement itself, but of the manner in which it was done, the claim for damages was not within the jurisdiction of the viewers, and the liability of the city could only be sustained by an action of trespass for negligence. The court overruled this defense, and held that the case was one for the viewers. Although the contention is thus apparently in regard to the form of the remedy, yet the fundamental question in the case is whether, under the constitution and the act of May 16, 1891 (P. L. 75), the liability of the city for damages for property injured in the construction of public work is limited to injury resulting from the work itself, or extends to that arising from the manner in which it was done.

Section 8, art. 16, of the constitution provides that "municipal and other corporations and individuals invested with

the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements." The purpose of this provision is clearly shone by the history of litigation before its adoption. The constitution of 1838, in article 7, provided that "the legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property"; and in the bill of rights (article 9, § 10) it was declared, "Nor shall any man's property be taken or applied to public use * * * without just compensation being made." Under the uniform construction given to these provisions, and to similar ones in other states, there was no liability unless property was actually taken. If an inch of his lot was taken in widening a street, the owner had his claim for compensation, but the far greater injury of blocking up or impeding his access by raising or lowering the street without actually encroaching on his line went without redress. Thus, in Green *v.* Borough of Reading, 9 Watts 382, the borough filled up the street in front of a house so as to obstruct the access, and deprive the owner of the use of an alley; in Henry *v.* Bridge Co., 8 Watts & S. 85, a similar obstruction was made by the erection of the abutments of a bridge; in O'Connor *v.* City of Pittsburgh, 18 Pa. St. 187, the street was lowered in grade to such extent as to impair the safety of the cathedral, and perhaps necessitate taking it down; and in Navigation Co *v.* Coons, 6 Watts & S. 101, the company, by its dam erected to aid slack-water navigation, backed the water up so as make useless a milldam previously erected by a riparian owner under the license of the act of 1803. All of these cases were held to be consequential injuries, for which there was no right to compensation. In the last-mentioned case CHIEF JUSTICE GIBSON says: "In one instance a profitable ferry on the Susquehanna was destroyed by the Pennsylvania Canal, and in another an invaluable spring of water

at the margin of the river, near Selinsgrove, was drowned. These losses, like casualties in the prosecution of every public work, are accidental, but unavoidable." In Henry *v.* Bridge Co., *supra*, the court said: "The plaintiffs recovered, doubtless rightfully, for turning the water on their ground, for the authority of the state cannot be implied for negligence; but for unavoidable damage in the accomplishment of the object the defendants are not liable." So great was the hardship felt to be that in O'Connor *v.* City of Pittsburgh, *supra*, CHIEF JUSTICE GIBSON said: "We have had this cause reargued in order to discover, if possible, some way to relieve the plaintiff consistently with the law; but, I grieve to say, we have discovered none."

This was the condition of the law which the present constitution ment to change by the provision for compensation for property "injured or destroyed." And the injury meant to be provided for was such as, in the language of Navigation Co. *v.* Coons and Henry *v.* Bridge Co., *subra*, was "unavoidable in the accomplishment of the object." For such injury there was no redress under the former constitution, and it was to remedy this defect that the present constitution added property "injured or destroyed" to property "taken," compensation for which has always been secured. For negligence in the manner of doing the work there is and always has been a liability and adequate redress by an action on the case. Such injury was not in need of any additional remedy, and none was contemplated by the provision in question. The difference in the modes of procedure is much more than one of form. It involves substantial difference of the rights to be vindicated, and perhaps of the parties to be fixed with responsibility. For such injury as is the direct and necessary consequence of the act itself of eminent domain, the liability of the city under the constitution is absolute, and no care or diligence will relieve it. But for damage resulting from the manner in which the act is done the city is only liable by reason of negligence. Such damage is like the deprivation of land in

**Eminent Domain —Deprivation of Lateral Support —Constitutional Provision—Liability of City.**

an artificial state, with buildings on it, of its lateral support. It is subject to the right of the adjoining owner to excavate his own land, without liability for consequences, unless they are due to want of proper and reasonable care on his part. To throw these two kinds of claims into a single action involves the serious inconvenience of expecting the jury to keep the line of distinction clearly in view, and applying the evidence to each side of the line appropriately, with the further difficulty that the measure of damages is wholly different. In the present case the plaintiff's house was not directly affected by the city's act of eminent domain. If the subway had been dug by a private citizen on his own land, without negligence, there would have been no liability on his part. The city's liability is no different, for there is no necessary connection between the thing to be done and the injury sued for. The plaintiff's own witnesses testified that the injury could have been avoided by proper precautions before taking down the adjoining house. It was therefore as much the result of the manner of doing the work as if in excavating the subway an excessive blast had thrown a piece of rock and injured a house a square or more away. For that class of injuries the only appropriate remedy is an action of trespass for negligence.

The present question has not heretofore been before the court in reference to municipal improvements. In Snyder *v.* City of Lancaster (Pa. Sup.), 11 Atl. 872, a part of the rear of plaintiff's lot was taken in the widening of a street. The case was therefore properly before a jury of view, and, though no part of the house was taken, yet, owing to the manner in which it was built against the adjoining house, a special injury to it was a necessary consequence of the act itself of taking the adjoining house. This court therefore held that the whole injury to the house, as well as to the lot, was a necessary result of the opening of the street. Ladd *v.* City of Philadelphia, 171 Pa. St. 485, 33 Atl. 62, chiefly relied on by appellee, was an action of trespass, and all question on the form of remedy was expressly waived by

agreement. The case was tried on the issue of fact whether the cause of the cracking of the walls was the construction of the sewer by the city, or the insecure nature of the made ground on which plaintiff's house was built. The question developed in the present case was not the basis of decision, and the language of the opinion must be taken in connection with the case as then presented. Whether the result was consistent with the settled rule of law as to lateral support of land in an artificial state we are not now called upon to consider. In Mellor *v.* City of Philadelphia, 160 Pa. St. 614, 28 Atl. 991, access to plaintiff's house was cut off by the lowering of the grade of the two cross streets between which the house was situated; and it was held that, although his house did not abut directly on the line of the improvement, yet the latter resulted in such proximate and immediate injury as to bring him within the constitutional protection. The word "necessary" or "unavoidable" was not used it connection with the injury, but was so obviously applicable that no question was raised which called for discussion of that point. In *Re* Melon St., 182 Pa. St. 397, 38 Atl. 482, 38 L. R. A. 275, the question was whether the injury to plaintiff by cutting off the street at one end of the square in which his house was situated was an injury different in kind as well as in degree from that to the general public. There was no question that it was the direct and necessary result of the city's act in vacating the street. The cases of *In re* Walnut St. Bridge, 191 Pa. St. 153, 43 Atl. 88, and *In re* Chatham St., 191 Pa. St. 604, 43 Atl. 365, rest on the same basis,—that the injury was the direct and necessary result of the city's act, without regard to the manner in which it was done. But, though the question has not directly arisen or been discussed in regard to municipal improvements, the principle has been clearly enunciated and applied to the analogous case of the exercise of eminent domain by a pipe line for transporting gas. In Denniston *v.* Philadelphia Co., 161 Pa. St. 41, 28 Atl. 1007, the defendant company, under its right of eminent domain, laid a pipe through plaintiff's

farm; and plaintiff proceeded for damages before viewers, and on appeal before a jury in the common pleas. In the opinion of this court our BROTHER MCCOLLUM said: "The inconveniences and injuries caused by the location of a skillfully constructed and carefully operated pipe line may be considered in a proceeding for the assessment of damages to the land through which it passes, but such as are produced by the careless construction and operation of it cannot be. The former are the natural and ordinary consequences of the location, construction, and use of the line, and terminate only with the abandonment of it, while the latter are exceptional, and may be prevented by the use of the best known appliances and skill, and the observance of due care in the prosecution of the business, and they constitute an independent cause of action. In this case the plaintiffs were entitled to be compensated for the depreciation in the market value of their farm due to the location and construction of the pipe line, but not for injuries caused by the negligent operation of it." The learned judge at the trial had instructed the jury correctly in accordance with the rule thus laid down, but the judgment was nevertheless reversed because the evidence had failed to give the jury any clear means of discriminating between the two classes of injury. "The evidence in cases of this nature should be restricted to matters proper for consideration in ascertaining the depreciation in the market value of the land. * * * An injury which is or may be produced by negligence in the operation or care of the line is not such a matter. It may be that the leakage complained of in the case before us was due to the company's negligence. * * * There was no attempt to show that it was inseparable from, or a natural and ordinary consequence of, the location and construction of the line." *Id.*, 161 Pa. St. 46, 28 Atl. 1008. After a second trial the case came up again for review before the superior court, and was again reversed for substantially the same errors. Denniston *v.* Philadelphia Co., 1 Pa. Super. Ct. 599. The rule which was thus emphatically enforced, and which is the logical de-

Note

duction from the history of the amendment to the law, is that the absolute liability for injury to property imposed by the constitution, and put by it on the same footing as a taking for public use, is such injury only as is the direct, immediate, and necessary or unavoidable consequence of the act of eminent domain itself, irrespective of care or negligence in the doing of it. For such injury a proceeding before viewers is the appropriate remedy. But for injury by negligent performance of the work the remedy must be by action of trespass. In the present case the injury complained of was not the necessary consequence of the improvement authorized and undertaken by the city. The plaintiff's own witnesses, as already noted, testified that it could have been avoided by due care. The liability declared upon therefore arose, if at all, from negligence, and could not be enforced in this form of proceeding. It is said that the city is estopped from setting up this objection by the fact that the plaintiff appeared before the viewers in response to notice to do so. But no notice from the viewers could give them any authority to pass on a question of liability which the law has not put within their jurisdiction. Judgment reversed.

Estoppel.

DEAN, J. (dissenting). The city did not appropriate plaintiff's land, but, in constructing a lawful improvement, it injured and destroyed her house. The constitution expressly gives her a remedy for damages. I can see no substantial distinction between the facts in this case and those in Snyder *v.* City of Lancaster (Pa. Sup.), 11 Atl. 872. I would affirm the judgment. on what seems to me the unanswerable opinion of the learned judge of the court below on motion for a new trial. For the reasons therein given, I dissent from the judgment of the court in this appeal.

MESTREZAT, J. I join in this dissent.

NOTE.

**Eminent Domain—Damages from Improper Construction.**—In condemnation proceedings, only such damages are to be allowed as arise from proper construction. For negligent or improper con-

struction additional damages may be recovered by action at law. Miller v. Keokuk & D. M. R. Co., 14 Am. & Eng. R. Cas. 293, 63 Iowa 666, 16 N. W. Rep. 567; Dowd v. Mason City & Ft. D. R. Co., 36 Am. & Eng. R. Cas. 633, 76 Iowa 438, 41 N. W. Rep. 65; Dearborn v. Boston, C. & M. R. Co., 24 N. H. 179; Neilson v. Chicago, M. & N. W. R. Co., 14 Am. & Eng. R. Cas. 239, 58 Wis. 516, 17 N. W. Rep. 310; Denver City I. & W. Co. v. Middaugh, 12 Colo. 434, 21 Pac. Rep. 565. In Dodge v. County Comm'rs of Essex, 1 Am. Ry. Cas. 336, SHAW, C. J., after stating that authority to construct any public work carries with it an authority to use the appropriate means, and damages arising from such use may be compensated, says: "Of course this reasoning will not apply to damages occasioned by carelessness or negligence in executing such work. Such careless or negligent act would be a tort for which an action at law would arise against him who commits or him who commands it. But where all due precautions are taken, and damage is still necessarily done to fixed property, it alike is within the letter and the equity of the statute, and the county commissioners have authority to assess the damages." See Pittsburg, F. W. & C. Ry. Co. v. Gilleland, 56 Pa. St. 445, 94 Am. Dec. 97.

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## SCHUETT

*v.*

## CITY OF STILLWATER.

(*Supreme Court of Minnesota, June 25, 1900.*)

**Streets—Change of Grade—Turning Surface Water upon Private Property—Liability of City.***—In an action against a city to recover damages to real property alleged to have been caused by the defendant's negligence when grading a street, whereby a large quantity of surface water had been unnecessarily and unreasonably collected, and in destructive currents turned upon said property, the court charged the jury, in effect, that the city had no right to collect surface water, when grading its streets, at a point where it would not naturally go, except for such grading, and then turn it in destructive currents upon plaintiff's property, and, if it had done so, it would be liable in damages. *Held* to have been error. This statement of the law should have been qualified or modified to the effect that it was

*See *note*, 3 Mun. Corp. Cas. 757 *et seq.*; *note*, 1 Mun. Corp. Cas. 66 *et seq.*

Schuett *v.* City of Stillwater

the duty of the city to take care of surface waters accumulated because of street grading, so that it would cause no injury, if this could be done practically and at a reasonable expense. The duty is not an absolute one under all circumstances.

(Syllabus by the court.)

APPEAL by defendant from Washington county district court. *Reversed.*

*J. C. Nethaway*, for appellant.

*J. N. Castle*, for respondent.

COLLINS, J. This action was brought by plaintiff against defendant city to recover damages to her life estate in a certain lot, alleged to have been caused by the city's negligence when grading the street, whereby a large quantity of surface water had been unnecessarily and unreasonably collected, and turned upon her premises in destructive currents, to her damage. It is claimed by counsel for the defendant that the evidence was insufficient to justify the verdict, but we are not obliged to express any opinion upon this point, for the order must be reversed because of error in the charge. At the plaintiff's request the court gave three separate and distinct requests to charge, as follows: First. "While a city may make all needful and necessary arrangements for the disposition of surface water involved in the grading of its streets, it must do so with due regard to the rights and interests of others. It has no right to collect surface water at a point where it would not naturally go, but for its enterprise, and turn the same in destructive currents upon the adjoining land. If it do so, it will be liable to a person whose property is injured thereby for the damages he may sustain." Second. "In grading its streets, the city has a right to control the course of the surface water. It has a right to dam up and obstruct the same, and to change the direction of its flow. It may direct the same. But in so doing it must act with prudence, and a reasonable regard for the property rights of others. It has no right to needlessly or unnecessarily change the course of surface water, to the damage of others' property. If surface water can be disposed of equally

well without detriment to others' property, it is the plain duty of the city to so dispose of it; and it has no right to turn such water upon the property of others, when it can equally well be disposed of in its original channel, or in some other mode, without damage to others." This request was then qualified thus: "That is, gentlemen, when it can be done practically and at a reasonable expense. Water can be taken almost anywhere. You can almost make it run up hill. But it would not be the duty of this city to expend ten thousand dollars in taking water through a certain place, when, in the judgment of the city council, at the expenditure of one thousand dollars they could equally well provide for it." Third. "If the jury find from the evidence that the defendant might reasonably have constructed a culvert through its roadbed on Second street, on the line of the old channel, for the surface water near Balsam street, and thereby conveyed the water in question through its natural and usual channel from its street and right of way, without injury to any other landowner, and that it neglected to do so, but that it unnecessarily and unreasonably drained the water upon the plaintiff's property, then the plaintiff is entitled to recover." And at the defendant's request the court charged that "the failure to build a sewer underneath North Second street, between Balsam and Spruce streets, to take care of and drain off water that may have accumulated west of Second street at that point, is not negligence on the part of the city."

In the case of O'Brien v. City of St Paul, 25 Minn. 331, the law bearing on the duty of municipal corporations as to accumulated surface waters was very clearly stated in the following language: "From the complaint, there does not appear any necessity, in grading the avenue, to collect the water at the point indicated, nor any difficulty in conducting it off without injury to private property, if it was desirable to so grade the avenue as to accumulate the water there. Having accumulated the water there, it was the duty of the city to take care of it,—certainly, if reasonably practicable,—and prevent

its injuring others." It was there clearly stated as the law that, having accumulated water, it was the duty of the city to take care of it, if reasonably practicable, and thus to prevent its injuring others. It will be noticed that in giving these requests to the jury the court made three independent, distinct propositions thereof; the first one being, in effect, that the city would have no right to collect surface water at a point where it would not naturally go, but for the act of the city, and then turn the same in destructive currents upon adjoining land, and further that, if this was done, the person whose property was so injured could recover damages of the city. In no manner was this proposition qualified, as it should have been, and as was the second proposition to the effect that it was the duty of the city to take care of surface waters which it had accumulated, if this could have been done practicably and at a reasonable expense. This qualification is especially important where the surface of the ground is rough and hilly, as was that herein involved. It should have been made to the first proposition, and we are very clearly of the opinion that the subsequent qualification of the second cannot be held to have qualified the first in any manner. The modification might not have been understood by the jury as going to the first proposition. The duty to take care of surface waters is not an absolute one, as the court stated, in effect, it was, in the first proposition. See upon the subject, generally, Brown *v.* Railway Co., 53 Minn. 259, 55 N. W. 123.

We are also of the opinion that there was direct conflict between the third requests, as formulated by the plaintiff and given by the court, and the ninth request submitted by the defendant, and also given as the law in the case, which may have misled the jury. For the error in the first mentioned of these special requests, the order refusing a new trial must be, and hereby is, reversed, and a new trial granted.

HARVEY

*v.*

CITY OF CLARINDA.

(*Supreme Court of Iowa, May 21, 1900.*)

**Cities—Presentation of Claims—Statute.**—Section 1051 of the Code of Iowa, requiring a written verified statement of a claim against a city for personal injuries to be presented to the city council within thirty days after the accident, is applicable only to claims against cities acting under special charters.

**Personal Injuries—Unmanageable Horse and Unguarded Defect in Street—Proximate Cause—Question for Jury.***—Where a person without fault is injured through his horse becoming unmanageable and backing the vehicle against an unguarded defect in a street, the question as to the proximate cause of the accident is for the jury.

**Using Defective Street—Contributory Negligence—Question for Jury.**†—Although there is a defect in a street, it is not negligence, as matter of law, for a person having knowledge of the defect to use the street.

**Same—Same—Burden of Proof—Instructions.**—Defendant not having requested the court to instruct that the burden of proof was on plaintiff to excuse himself for using the defective crossing instead of the safe one, it was not error to fail to give such an instruction.

APPEAL by defendant from Page county district court. *Affirmed.*

*H. E. Parslow* and *S. McPherson*, for appellant.

*J. R. Good* and *T. E. Clark*, for appellee.

DEEMER, J. Defendant is a city of the second class. While driving along one of the streets of that city, plaintiff was thrown from the vehicle in which she was riding, and received the injuries of which she complains. The accident

*See Hungerman *v.* City of Wheeling (W. Va.), 3 Mun. Corp. Cas. 92, and *notes*, 101 *et seq.*

†See Lyons *v.* City of Red Wing (Minn.), 1 Mun. Corp. Cas. 483, and *notes*, 489 *et seq.*

occurred August 24, 1898, and plaintiff commenced her action November 19, 1898. The demurrer was on the ground that the action was barred because no written verified statement of the claim was presented to the city council within 30 days after the plaintiff received her injury, as required by section 1051 of the Code. That section requires a written, verified statement of the amount, nature, and cause of the injury, and of the time and place where the injury occurred, to be presented to the council or filed with the clerk within 30 days after the alleged injury was sustained. It is found in chapter 14 of the Code, relating to cities under special charters; and the first section of that chapter (section 933 of the Code) expressly provides that the provision of the chapter shall apply only to cities acting under special charters. With this plain declaration of legislative intent, there is no room for construction. If the section relied on were found in a chapter headed as this one is, there might be room for argument, but with this plain expression of legislative purpose found in the first section of the chapter, considered in connection with the thought that both sections were adopted by the same general assembly, there is no room for interpretation. The demurrer was properly overruled.

Cities—Presentation of Claims—Statute.

2. Defendant contends that its alleged negligence was not the proximate cause of the injury. The jury was authorized to find the following facts: Main street, which is one of the principal ones of the city, intersects the right of way of the Chicago, Burlington & Quincy Railroad in the eastern part of the city. At such intersection there are two ways for crossing, the railroad track,—one by means of an underground crossing, and the other by what is called a "grade crossing." The railroad track at the point in question is 7.3 feet above the ground level of the street, necessitating an elevated approach either side of the track. This approach is made of dirt. It is 144 feet in length on the west side of the railroad track, and 17 feet in width at the narrowest point. Immediately west of the west rail of the track it is 40 feet in

width, but the crossing itself is but 17 feet wide. The crossing is planked in the ordinary manner. For the first 100 feet the rise is 2.65 feet in 100, and 4.65 feet in the remaining 44. Between this approach and the north line of the street is the entrance to the underground crossing, and the slope between the driveways at the point where plaintiff received her injuries is 13 feet wide. The approach has no railings or barricades of any kind. On the evening of the day in question, plaintiff was driving east on Main street, intending to cross the railway tracks by the grade crossing, and when her horse had about reached the west rail of the tracks he suddenly turned to the north, and kept on turning until he had the buggy to which he was attached faced westward. Just after he turned and started towards the west, the wheels on the north side of the buggy reached the sloping ground of the approach, causing the buggy to tip to the north, and plaintiff to be thrown therefrom. The alleged negligence is the width of the embankment, the precipitous character of the banks, and the absence of railings or barriers. It is conceded that neither party is at fault or responsible for the horse's turning, and it is also agreed that, after he commenced to turn, plaintiff was free from negligence; but it is contended on behalf of defendant that it was not bound to provide against such accidents, and that, conceding its negligence, still the court ought to say, as a matter of law, that this negligence was not the proximate cause of the injury.

Personal Injuries—Uncontrollable Horse and Unguarded Defect in Street—Proximate Cause—Question for Jury.

There are some cases which hold that a city is not bound to anticipate such accidents, that it is not bound to provide against any use of its streets not contemplated in ordinary travel, and that, if the person injured is not at the time using the streets for the ordinary purposes of travel, he cannot recover. We have not fully adopted this rule. Of course, the city is not bound to do more than guard against ordinary contingencies, or those which might reasonably be apprehended. In other words, it is not an insurer against all accidents, and it is responsible only when it fails to use reasonable care to

keep its streets in reasonably safe condition for public travel. But if it fails in this, and injury results, not due to want of ordinary care on the part of the person injured, it is responsible. The mere fact that the driven horse is frightened or is temporarily unmanageable is not in itself conclusive. Now, the jury evidently found that defendant was negligent, and with that finding we cannot interfere; but should we say that this negligence was not the proximate cause of plaintiff's injury? Ordinarily, proximate cause is for the jury, and we see nothing in this case that takes it out of the ordinary rule. The fact that the horse, by reason of its disposition or habit, turned around on the embankment, is not controlling, unless plaintiff was in some manner responsible therefor. It is conceded, however, that she was not. The question for the jury was, then, would the accident have happened had defendant used the care required of it? It goes without saying that if, notwithstanding the use of proper care on defendant's part, the accident would still have happened, there could be no recovery. But that question, as we have said, was for the jury. In the case of Walrod *v.* Webster Co. (Iowa), 81 N. W. 598, we had occasion to consider the effects of the fright of a horse being driven over a county bridge, on the issue of proximate cause, and there followed the rule theretofore announced in Gould *v.* Schermer, 101 Iowa 582, 70 N. W. 697, and other like cases, wherein it is held that the mere fact that some other cause operates with the negligence of defendant to produce the injury does not relieve the defendant. His original wrong, with some other cause for which neither is responsible, and both operating proximately at the same time in producing the injury, make him liable. That case also distinguishes McClain *v.* Incorporated Town of Garden Grove, 83 Iowa 235, 48 N. W. 1031, 12 L. R. A. 482, relied on by appellant. The rule in Massachusetts, and perhaps some other New England states, differs from ours. See Marble *v.* City of Worcester, 4 Gray 395. But the great weight of authority is with us. See cases cited in Walrod *v.* Webster Co. (Iowa), 81 N. W. 598. The instructions given by the court fairly submitted the question of

proximate cause, and we should not interfere with the verdict. See City of Atlanta *v.* Wilson, 59 Ga. 544, 27 Am. Rep. 396.

3. The further point is made that plaintiff was guilty of contributory negligence. Ordinarily that, too, is a question for the jury. It was submitted in this case, and a finding of no contributory negligence returned. We are asked to hold that, as a matter of law, plaintiff was guilty of negligence contributing to her injury. Both ways of crossing were open to plaintiff, as the defendant did nothing to indicate that the grade crossing was unsafe. By leaving the approach open to travel, it impliedly invited the public to use it. Plaintiff had many times driven over both crossings, and was perfectly familiar with the situation. There also were other crossings that plaintiff might have taken to reach her destination, and she might have used the underground crossing. The jury was also authorized to find that there was nothing in the character or disposition of the horse that made it negligent for plaintiff to drive the animal. Although there may have been a defect in the highway, it was not negligence, as a matter of law, for plaintiff to use the street. That question is settled by a long line of authorities. Hoover *v.* Town of Mapleton (Iowa), 81 N. W. 776; Sylvester *v.* Town of Casey (Iowa), 81 N. W. 455, and cases cited. Further, in this connection, it is said that the court erred in not instructing the jury that the burden of proof was on plaintiff to excuse herself for not taking the safe crossing. Defendant asked no instructions relating to this subject, and therefore cannot complain. The usual and proper instruction with reference to plaintiff's duty, if she knew the crossing she attempted to use was dangerous, was given, but nothing was said as to the burden of proof. In the absence of request, failure to give an instruction relating to the burden of proof is not erroneous. Duncombe *v.* Powers, 75 Iowa 185, 39 N. W. 261; Martin *v.* Davis, 76 Iowa 762, 40 N. W. 712.

Using Defective Street—Contributory Negligence—Question for Jury.

Same—Same—Burden of Proof—Instructions.

We have considered all points argued, and find no error. Affirmed.

STATE

*v.*

HIGGS.

(*Supreme Court of North Carolina, March 27, 1900.*)

**Penal Ordinance—Validity—Jurisdiction.**—The contention that the ordinance in question was void for uncertainty, for the reason that it gave the mayor the discretion to fine the defendant, upon conviction, $50, or to imprison him for thirty days, was without merit; as the establishment of such courts for the trial of misdemeanors in cities and towns is expressly provided for by the constitution of North Carolina, and the charter of the city expressly constitutes the mayor such a court, when the punishment does not exceed a fine of $50, or imprisonment for thirty days.

**Same—Same—Same.**—Section 3818 of the Code of North Carolina gives to mayors the jurisdiction of justices of the peace, therefore, it was not necessary to decide whether the ordinance in question gave the mayor exclusive jurisdiction, and thereby took from justices of the peace their constitutional rights.

**Same—Validity.**—Such ordinance was not void for uncertainty in its penalty or punishment.

**Sidewalks—Right to Remove Signs.**—Although a city is the owner in fee of its streets and sidewalks, in the absence of express authority, it cannot compel an abutting owner to remove a sign suspended over a sidewalk, unless the sign in some way interferes, or tends to interfere, with the right of the public to safely use the sidewalk for the purposes for which it was constructed; and the charter of the city of Raleigh does not confer any greater authority, in this respect, than that exercisible under this rule.

**Same—Same—Police Power.**—A municipal corporation, in the exercise of its police power, cannot remove a sign hanging four feet from the wall of an abutting building, firmly and safely attached to the same, and fourteen feet above the sidewalk.

**Same—Same—Question for Jury.**—If there is evidence tending to show that a sign suspended over a sidewalk interferes, or tends to interfere, with the right of the public to safely use the sidewalk for the purposes for which it was constructed, the question is for the jury, and not for the court.

State *v.* Higgs

APPEAL by defendant from Wake county superior court. *Reversed.*

*R. O. Burton*, for appellant.

*The Attorney General* and *Watson & Gatling*, for the State.

FURCHES, J. This is a prosecution commenced before the mayor of the city of Raleigh for an alleged violation of an ordinance of the city. The ordinance under which the defendant is indicted is as follows:

Case Stated.

"Section 1. That no sign shall be suspended or projected over the sidewalks in the city of Raleigh.

"Sec. 2. That all signs that are now projected or that are suspended over the sidewalks of the city of Raleigh shall be removed, together with the rods and poles used for suspending or swinging said signs, by the 15th day of August, 1899.

"Sec. 3. Any person or firm violating the provisions of this ordinance or failing to comply with the provisions of the same, shall, upon conviction before the mayor, be fined fifty dollars, or imprisoned thirty days."

The legislature of 1899 (chapter 153, Priv. Acts) enacted a new charter for the city of Raleigh, and our attention is called to the following provisions therein for the purpose of showing the power of the city, which, the state contends, authorized the charge of the court and the verdict of the jury in finding the defendant guilty:

Sections of the charter:

"Sec. 33. That it shall be the duty of the aldermen to attend all the meetings of the board unless unavoidably prevented from doing so, and when convened, a majority of the board shall have power to make, and to provide for the execution of such ordinances, by-laws, rules and regulations, and such fines, penalties and forfeitures for their violation as may be authorized by this act, consistent with the laws of the land and necessary for the proper government of the city: provided, that no penalty prescribed by the board of aldermen for the violation of any of the provisions of this act, or of any ordinance, by-law, rule or regulation made in

pursuance hereof shall exceed fifty dollars' fine or thirty days' imprisonment."

"Sec. 80. That all penalties imposed under the provisions of this act or of any ordinance, by-law or regulation of the city, unless herein otherwise provided, shall be recoverable in the name of the city of Raleigh before the mayor; and all such penalties incurred by any minor shall be recovered from the parent, guardian or master, as the case may be, of such minor."

"Sec. 34. That among the powers conferred on the board of aldermen are these: * * * Ascertain the location, increase, reduce and establish the width and grade, regulate the repairs and keep clear the streets, sidewalks and alleys of the city; extend, lay out, open, establish the width and grade, keep clean and maintain others; establish and regulate the public grounds, including Moore Square, Nash Square and Pullen Park, have charge of, improve, adorn and maintain the same, and protect the shade trees of the city."

"Sec. 38. That they may require and compel the abatement of all nuisances within the city, or within one mile of the city limits, at the expense of the person causing the same, or the owner or tenant of the ground whereon the same shall be. * * *"

Subsection 6 of section 79 provides: "(6) Any person * * *; or who shall excavate, construct, build, use, keep or maintain any cellar, basement, area, passage, entrance or way under any sidewalk, or build, construct, keep, use or maintain any veranda, piazza, platform, building or stairway or other projection or construction upon or over any sidewalk in the city whereby the free and safe passage of persons may be hindered, delayed, obstructed or in any way endangered, * * * without having first taken out a license therefor; * * * shall be guilty of a misdemeanor, and upon satisfactory proof before the mayor shall be adjudged to pay for every such offense a fine not exceeding fifty dollars, or be imprisoned not exceeding thirty days."

The sections in the charter are not produced seriatim, but

as they are presented in the brief and argument of counsel who represented the state.

Upon the trial the state introduced the charter and the ordinances of the city, and the following evidence: "The state then introduced Chief of Police Mullins, who testified that a written notice from the mayor to take down his sign was served on defendant before the beginning of this proceeding, which notice was put in evidence. That the sign was not taken down, and is still up. On cross-examination, the witness stated that the sign was an electric sign, which spelled out Higgs' name by the passage of a current of electricity; that it was an ornament to the street, and did not interfere with passage or vision. It was at its lower end about fourteen feet above the sidewalk, projected four or four and a half feet from building; was twelve to fourteen feet long, about eighteen inches wide, made of plank, and apparently a very heavy one; was fastened at the top to a bar of railroad iron, and at the bottom to a round bar of iron. The sign itself hung vertically, and he thought it was as practically secure as the house itself. Did not think there was any danger of falling or being blown down. Had never examined closely the fastenings to the bar of railroad iron. Witness identified the photograph of the sign, which was put in evidence, and which was taken before the lower swinging signs on the street were taken down. The sign which Higgs had swinging to the lower rod, as shown in the photograph, was taken down by him before this proceeding was started. The lower rod was also cut off at the end. Witness said it was still common for porticos or balconies, awnings and signs on awnings, and signs on the outer railing of balconies, and signs projecting a few inches over the sidewalks, to exist. There are many of them in the city. There are balconies in front of many buildings on Fayetteville street, projecting over sidewalk three to four feet. One over Yarboro House, Henry Building (with J. M. Broughton & Co.'s sign on outer railing; also Foller's, the tailor); one over A. B Stron-

ach's, with his sign on outer railing. Many awnings in the city which cover the entire sidewalk, some of wood, some of cloth,—some signs on cloth, as Berwanger's stretching clear across sidewalk; and some on wood, as W. B. Mann's, at edge or side of awning, and extending over street. Some other signs were allowed to set on sidewalk, as of Watts, the barber. A great many signs on the doorfacing, which project a few inches over the sidewalk, as R. B. Raney's, Raleigh Savings Bank's, Boylan, Pearce & Co.'s, W. E. Jones', a member of the board of aldermen, Cross & Linehan's. Jones & Powell have steps leading from Fayetteville street down into their cellar. On each side of cellar is an iron railing, and till recently they had suspended on the railing an ice and coal sign. W. H. King & Co.'s drug store projects above some distance over sidewalk, and sign is painted on it, as shown from the photograph. Y. M. C. A. Building has steps in street. W. Z. Blake, street commissioner, was introduced by the state, and testified that he measured that morning the distance from the front wall of Higgs' store to center of street. It was 49½ feet. The state then introduced the charter of the city of Raleigh, as contained in chapter 153 of the Private Acts of 1899, and thereupon rested its case. The defendant's counsel contended that the ordinance was void; that on the evidence he was the owner to the center of the street, subject to the easement of the public, and had the right to make the customary and proper use of his property; that he was discriminated against, and that the ordinance was unreasonable and arbitrary and oppressive; that the board of aldermen had no power to adopt it, especially in its form and to the extent they claimed; and that it was an attempt to create a criminal offense, which they had no power to do. His honor charged the jury that if they believed the evidence they should find the defendant guilty. Verdict guilty. Defendant excepted, and appealed from the judgment pronounced.

There were exceptions taken on the argument to the juris-

diction of the mayor of the city to try the case, if the defendant was guilty of a criminal offense, for the reason that he was given exclusive jurisdiction. It was also contended that the ordinance was void for uncertainty, for the reason that it gave the mayor the discretion to fine the defendant, upon conviction, $50, or to imprison him for 30 days. We do not think either of these objections can be sustained. Article 4, § 14, Const., expressly provides for the establishment of such courts for the trial of misdemeanors in cities and towns; and the charter of the city of Raleigh (section 79, subsec. 6) expressly constitutes the mayor a court for the trial of misdemeanors committed within the city, when the punishment does not exceed a fine of $50 or imprisonment for 30 days. It would therefore seem that the mayor had jurisdiction, unless the ordinance is void, for the reason that it gives the mayor exclusive jurisdiction, and takes from justices of the peace their constitutional rights. But, without discussing that question, we are of the opinion that it is not presented in this case, as it must be conceded that the mayor has a co-ordinate jurisdiction, if not the exclusive jurisdiction, and that is all that is necessary to be established to give him jurisdiction of this offense, if it be an offense. Section 3818 of the Code gives to mayors the jurisdiction of justices of the peace; therefore he had jurisdiction outside of the charter.

Penal Ordinances—Validity—Jurisdiction.

Same—Same—Same.

Neither do we think the ordinance is void for uncertainty in its penalty or punishment. The ordinance of the city limits the punishment to $50 fine or 30 days' imprisonment; and section 3820 of the Code makes the violation of a city ordinance a misdemeanor, and limits the punishment to a fine not to exceed $50, or imprisonment not to exceed 30 days. This is the exact language of the constitution, and therefore cannot be unconstitutional, as applied to misdemeanors. It seems to us that it must follow that the ordinance is not void for uncertainty, and, if not void for uncertainty, its violation was a misdeameanor, unless it was

Same—Validity.

void for other reasons than for uncertainty in its punishment. But, if it was void for any reason, it was not unlawful to refuse to obey it, and its violation was no criminal offense.

But the ordinance may not be void (and we do not say that it is) when properly construed, and the defendant still not be guilty; and it seems to us that it has not been properly construed in the trial of this case. Whether the legislature could in express terms authorize the city to require the defendant to take down this sign by the passage of an ordinance, or be guilty of a criminal offense, we very much doubt. But it is not necessary that we should pass upon that question, as we do not consider that it has attempted to give the city authorities that power. And we therefore consider the question from that view of the case, as it must be admitted that they had no such right unless it is given them in the charter of the city.

A municipal corporation is a creature of the legislature, and only has such powers as are expressly given it, or such as are incident to the powers expressly given, and necessary to the execution of the express powers. It seems to be conceded that they had no express power to pass an ordinance requiring the defendant to take down this sign. And we do not mean to say by this that the city authorities undertook to pass a personal ordinance requiring the defendant to take down his sign, but to say they had no express authority to pass a general ordinance requiring all such signs as his (if there are others) to be taken down, the violation of which would be *per se* a misdemeanor.

But the state contends that the city had express authority to open and grade streets, and clear and keep clear the streets and sidewalks of all obstructions; that the city is the owner of the streets and sidewalks, *cujus est solum ejus est usque ad cœlum*, and that the city authorities have the absolute right to remove any permanent fixture upon or over the streets or sidewalks; that they have the same rights of property over the sidewalks of the city that a private citizen has over his land; and, having this right, they have the

right, by the exercise of their arbitrary power, to require the defendant to take down his sign. The fallacies of these contentions are that the mayor and aldermen of the city of Raleigh do not own the streets and sidewalks; that, while the fee may be in the city, it is held in trust for the use and benefit of the public. And the mayor and aldermen are but the agents of the city to look after the condition of the streets and sidewalks for the use and benefit of the public, and they have no power arbitrarily to do anything which interferes with the right of the citizen that the public has not and cannot have any interest in. But the defendant, besides his general interest which he has in common with the public generally, is an abutting owner to this street and sidewalk, and in this way has a special property,—an easement in his frontage upon the street. White *v.* Railroad Co., 113 N. C. 612, 18 S. E. 330, 22 L. R. A. 627; Moose *v.* Carson, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548; Yates *v.* Milwaukee, 10 Wall. 497, 19 L. Ed. 984. This seemed to be conceded as a general proposition. But the state undertook to distinguish this case, and take it out of the general rule, by alleging that the city of Raleigh was the owner in fee of the street, and for this purpose has inserted in its brief the acts and ordinances locating the city of Raleigh. And, while they might have been introduced on the trial (Dill. Mun. Corp. § 83), they were not introduced, and we must be governed by the record. But lest it might be inferred that, had they been introduced in evidence, our judgment would have been for the state, we think it best to consider the case as if they had been introduced.

Had they been introduced, we are unable to see that this would have affected the status of the parties, or would have in any way affected the conclusion at which we have arrived.

Sidewalks—Right to Remove Signs.

We have assumed that the city was the owner in fee, and sold to the defendant, or those under whom he claims, the lot he now occupies, abutting on Fayetteville street, and, by this sale and purchase, the defendant acquired the rights of an abutting land-owner,—

an easement which is more than that of the general public, but subject to the lawful government of the city, so far as it is necessary for the use and benefit of the public. The case of Moose *v.* Carson, *supra*, cited by the state to sustain its contention, we think sustains the position taken by the court. Then, was it necessary for the public benefit—for the public convenience, the public safety—that this sign should be removed? If it was, then the city authorities, under their granted powers, would have the right to remove it. This power would then be one of the powers incident to their express powers granted to them over streets and sidewalks of the city for the benefit of the public, while, on the other hand, the defendant had the right of an abutting owner,—an easement; the right to use his frontage for the benefit of his property, as he pleased, in such a way as not to interfere with the rights of the general public, in safety using the sidewalk for the purpose of traveling the same on foot, and for passing and repassing. And if his sign in no way impeded, or tended to impede, such travel, or in no way endangered the safety of such pedestrians in passing over the sidewalks, as they were wont to do, then the city had no right to require him to take it down, and it was no offense in the defendant to refuse to do so, and he would not be guilty of any criminal offense. It is only the violation of a legal ordinance that is a criminal offense. It is only to valid and lawful ordinances that section 3820 of the Code applies.

While we have been so far discussing this case upon general law and general principles, we do not believe that a fair and reasonable interpretation of the charter goes further, or was intended to go further, or to authorize the city fathers to do more than we have said they could do. It provides in paragraph 6 of section 79 (after enumerating other things), "or other projection or construction upon or over any sidewalk in the city, whereby the free and safe passage of persons may be hindered, delayed, obstructed or in any way endangered." Therefore, to our minds, it is manifest that this paragraph of the charter is qualified and restricted, and that

the obstruction (if we may call it such) must be such as will hinder, delay, obstruct, or in some way endanger the use of the sidewalk (or, at least, tend to do so) to the use of pedestrians in passing and repassing upon it. According to the evidence in the case, no one of these conditions is present. The sign is 14 feet above the sidewalk, and, of course, cannot be an obstruction to pedestrians, and it is shown to be perfectly secure, and in no danger of falling.

But the state contends that the charter (section 79, subsec. 6) authorizes the aldermen to condemn this sign, and to require its removal, and that they have done so, and that defendant was properly convicted. We do not think so. We are of the opinion, as we have said, that a fair and reasonable interpretation of the statute does not sustain the state's contention. But, if there are doubts as to its construction (and we do not think there are), they must be resolved against the power and against state, as its right depends upon this power. 2 Dill. Mun. Corp. § 91; Slaughter *v.* O'Berry (N. C.; at this term) 35 S. E. 241.

Same—Same—Police Power.

The governing bodies of cities and towns are vested with what is known as "police powers," and they may do many things under and in exercise of this power. But still they must act within the scope of their delegated powers, or their acts are *ultra vires* and void. They cannot do what they are not authorized to do by their charter or by the general law of the land. If a thing within itself is not a nuisance, they cannot make it so by saying it is. If a sign hanging four feet from the wall of defendant's store building, firmly attached to the same, and fourteen feet above the sidewalk, is not an obstruction to footmen on the sidewalk, the city authorities cannot make it so by saying it is. And if this sign is securely attached and fastened to the building by iron bars and fastenings, so that there is no danger of its falling, the city authorities cannot make it dangerous by saying it is. State *v.* Webber, 107 N. C. 962, 12 S. E. 598; State *v.* Taft, 118 N. C. 1190, 23 S. E. 970, 32 L. R. A. 122; Dill. Mun. Corp. § 87. The

state must show the power, or the ordinance is void. Cooley, Const. Lim. (4th Ed.) 236. This question of overhanging signs has been elaborately and ably discussed in Goldstraw *v.* Duckworth, 5 Q. B. Div. 275, and very much the same views are taken in that case, as to such signs, as are taken in this opinion.

But it is said by the state, among many arguments it makes for the support of the judgment below, that to hold that the city had not the power to have this sign taken down would destroy all city government. We do not think so. But, if the law is so written, it must be so held, though it should have that effect. But it must be kept in mind that the power of the city government is not all that is to be considered in deciding this case. The rights of individual citizens are also to be considered, and they are of equal importance, and probably more in need of the protection of the courts than the mayor and board of aldermen of the city of Raleigh. The court holds that, upon the evidence in this case, the court below should have instructed the jury that, if they believed all the evidence, the defendant was not guilty. But if there had been evidence tending to show that the sign was an "obstruction" to footmen on the sidewalk, or tending to show that it was dangerous to the traveling public, it would have been the duty of the court to submit the question to the jury upon proper instructions. Howard *v.* Robbins, 1 Lans. 63; People *v.* Carpenter, 1 Mich. 287. And to this it is replied that this would be destructive of all city government to leave such questions to the jury. We do not think so; but, as we have said, if it is the law, it must be so held, let the results be as they may. But as between a jury, under the restraints of an oath and the instructions of a judge, we think the citizen's rights would be more likely to be protected than they would be by the uncontrolled authority of the city government. The boundary between the rights of the citizen and the powers of the mayor and aldermen is not very plainly marked, and is

Same—Same—Question for Jury.

easily invaded, unless great care is taken. But this line is there, though delicately marked, and it must be found and observed. Slaughter *v.* O'Berry (N. C.; at this term), 35 S. E. 241. While this is true as to many things, there are other rights and duties that the city authorities plainly have. It is plain that they have such powers as are expressly granted, unless they are void as being unconstitutional, or in violation of individual rights as established by the general law of the land. They also have such other powers as are incident to and necessary for them to have and exercise in order to carry out and enforce such express powers as are lawfully granted them. It is their duty to keep the streets and sidewalks in good condition, and to remove such obstructions from the sidewalks as are on them, and are manifestly calculated to "hinder, delay, or endanger" the ordinary use of said sidewalks. Such obstructions clearly fall within their power, and it is their duty to exercise it in a proper manner. But such things as do not appear to hinder, delay, or endanger the public, and do not in any way obstruct the sidewalks, they do not have absolute control over. And to give them this right, they must allege and show that such signs or other such things are obstructions, or tend to obstruct, or that they are dangerous to the traveling public.

For these reasons, we do not say that the ordinance is absolutely void, because, if the state can show that the sign is dangerous to the public, the city authorities had the right, and it was their duty, to have it taken down, and in such event the defendant would be guilty of a violation of the criminal law of the state. But the state must allege and show this before he is liable. There is error for which there must be a new trial.

CLARK, J. (dissenting). No provision of the constitution can be found that forbids, or even makes doubtful, the right of the people of this state, speaking through their representatives in the general assembly, to authorize the aldermen or commissioners of any town or city to forbid the swinging of signs across the sidewalks. Certainly none has been cited.

State *v.* Higgs

The charter provides, in section 34, "that among the powers conferred on the board of aldermen are these: * * * Ascertain the location, increase, reduce and establish the width and grade, regulate the repairs and keep clear the streets, sidewalks and alleys of the city; extend, lay out, open, establish the width and grade, keep clean and maintain others; establish and regulate the public grounds, including Moore Square, Nash Square and Pullen Park, have charge of, improve, adorn and maintain the same, and protect the shade trees of the city." The title to the streets of a city is in the city, for the use of the public. The defendant, an abutting owner upon a street, has no more rights therein than any one else. He has the right of ingress and egress to and from his store, but so has the public, unless he closes it. He has no right to obstruct the view of the street by a sign, unless permitted by the city authorities. He has no more right to hang a sign in the street than the city has to suspend anything above his premises. He owns to the line of his lot, but no further. His easement in the street is simply that it shall not be closed up or perverted to other uses. Moose *v.* Carson, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548; White *v.* Railroad Co., 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627. Whatever has been done in the way of hanging signs across the sidewalks in the past has been by the tacit assent of the city authorities, revocable at will, whenever they deem such mode of swinging signs injurious to the appearance of the city. It would be strange if it were otherwise, seeing that in England, whence we derive our common law, for hundreds of years signs have not been allowed to project over the sidewalks, but are placed flat against the wall of each place of business. There is probably no town in the United Kingdom, however small, in which signs are allowed to hang across the sidewalk, and the same is true of the countries of Western Europe generally. The same ordinance has been adopted by many cities in this country, and in a few years will doubtless become the general, if not the universal, rule. After most diligent research by counsel and

the court, no decision has been found from any court, in any country, till now, which denies the power of the town council to pass an ordinance like that now called in question. The powers of a city government are not restricted to suppressing what is dangerous, but extend to adorning and beautifying the city (when they possess the funds), and to removing from the public streets that which mars their appearance, and equally that which is unpleasant to the eye as that which is disagreeable to the nose. This particular sign may be ornamental, and so may others, but, if the board of aldermen think the custom of hanging signs over the sidewalks injurious to the appearance of the streets, they could pass this ordinance, impartially ordering the removal of all signs hung across the sidewalks. Now that there is a spirit springing up in favor of beautifying our cities and towns, it is to be regretted that the cold shadow of a judicial inhibition should fall upon the movement in this state, to chill it.

Were a single act, like the hanging out of the defendant's sign, seized upon for its removal as dangerous, or because otherwise a nuisance, then an issue of fact would be raised for a jury. But when it is an ordinance, impartially ordering the removal of all swinging signs above the street or sidewalk, and the defendant's sign admittedly comes within the words of the ordinance, then it is not an issue of fact for the jury, but a question of the power to pass the ordinance. The people of Raleigh, acting through their duly-elected board of aldermen, should certainly be able to decide whether they wished these signs removed or not, and, if the aldermen do not correctly express public opinion, the next board of aldermen will permit the swinging signs to go back. Local self-government demands that much. The people of any town can decide such questions for themselves better than the courts. It is hardly to be conceived that any part of the functions of the supreme court of a state is to act as a supervisory board of public works, to pass upon, restrict, or veto the action of the board of aldermen of any town upon such matters as the present. CHIEF JUSTICE PEARSON, in Brod-

nax *v.* Groom, 64 N. C. 250, expressed much common sense and a sound knowledge of the true functions of the court when he said: "This court is not capable of controlling the exercise of power on the part of the general assembly or of the county authorities, and it cannot assume to do so without putting itself in antagonism as well to the general assembly as to the county authorities, and erecting a *despotism of five men* [italics in original], which is opposed to the fundamental principles of our government and the usages of all times past." What the learned chief justice said as to "county authorities" has, of course, the same application to city authorities. In that case the court held itself incompetent to control the action of the county authorities in building a bridge, or in supervising its location or cost, or passing upon the necessity for it, because building bridges belong to the county commissioners, and not to the court. Here the regulation of the streets, and the removing of what therein impedes their use or impairs their appearance, is for the town authorities to decide, and they ought to decide it, subject to correction only by the people of the town at the ballot box, who are the best judges of what is proper and meet as to such matters for their own municipality. The defendant has no property rights in the streets more than any one else who uses them. His land ends where his deed calls for, *i. e.* at the edge of the sidewalk next to his store. Whatever privileges he is allowed on the sidewalk, or in the air above it, more than belongs to all alike, is a mere tacit license from the town, revocable at its will. Moose *v.* Carson, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548, holds that, where a town conveys land bounded by a street, it cannot afterwards convey away the street itself. White *v.* Railroad Co., 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627, holds that the abutting proprietor has an equitable easement in the street to the extent that it shall not be perverted to other uses. Goldstraw *v.* Duckworth, 5 Q. B. Div. 275, is a very short opinion, construing that the language of a local statute to prevent nuisances upon the pavements of streets was not intended to prohibit projections, like

balconies and the like, above the pavements. But neither these decisions, which are the reliance of the defendant, nor any others yet found from any court, sustain the contention that the town authorities do not possess the power to pass the plain unequivocal ordinance (which is here called in question), that "all signs suspended over the sidewalks of the city of Raleigh shall be removed by August 15, 1899." No court till now has ever questioned such power, though it has been exercised for centuries in the home of the common law. On the contrary, in Tate *v.* City of Greensboro, 114 N. C. 392, 19 N. E. 767, 24 L. R. A. 671, it is held: "The courts will not interfere with the exercise of a discretion reposed in the municipal authorities of a city as to when, and to what extent, its streets shall be improved, except in cases of fraud and oppression, constituting manifest abuse of such discretion." In that case it was held that the discretionary power over the streets authorized the town council to remove shade trees, against the protest of the owner of the abutting lot. That case cites with approval the following from the United States supreme court in Barnes *v.* District of Columbia, 91 U. S. 540, 23 S. E. 440: "The authorities state, and our own knowledge is to the effect, that the care and superintendence of streets, alleys, and highways, the regulation of grades, and the opening of new and the closing of old streets, are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done." The right to open new and close old streets is certainly greater than the power of removing signs that obstruct the view and impede the circulation of air and light. The right of "superintendence of the streets," thus fully recognized by both courts, extends, like the defendant's ownership of his own lot, *usque ad cœlum*. The city authorities are not chained down to surface improvements, but can rise to the level of the occasion.

## TOWN OF HARRISONBURG

*v.*

## ROLLER.

(*Supreme Court of Appeals of Virginia, Nov. 16, 1899.*)

**Streets—Change of Grade—Liability for Consequential Damages.***—In the absence of a special statutory or charter provision, a municipal corporation is not liable for consequential damages to abutting premises from the exercise of its authority to change the grade of a street or sidewalk, where there is no negligence in the performance of the work, and no part of such premises is taken.

**Same—Same—Negligence—Remedies.**—If damage ensues to the owner of adjacent premises from the negligent performance of such work, the remedy is by an action at law, and not in equity.

**Same—Same—Equity Jurisdiction.**—It is beyond the jurisdiction of a court of equity to fix the grade of a town sidewalk in front of a residence, or to prescribe minutely the manner in which the municipality shall do the work of changing the grade.

**Same—Same—Delegation of Authority.**—The contention, that the city council delegated to the discretion of its street committee the work of raising the sidewalk in front of the residence of complainant, was without foundation.

**Estoppel.**—The contention, that the defendant town was estopped from raising the sidewalk in question by reason of a decree of the circuit court in a former suit between it and plaintiff, was without foundation.

APPEAL by defendant from Rockingham county circuit court. *Reversed.*

*Yancey & Haas*, for appellant.

*John E. Roller* and *Jos. B. Stephenson*, for appellee.

RIELY, J. This is an appeal from the decree of the circuit court of Rockingham county, perpetually enjoining the

*See *note*, 1 Mun. Corp. Cas. 73.

town of Harrisonburg from raising the sidewalk in front of the residence of the appellee, in the execution of the plan adopted by it for improving and laying the sidewalks on the west side of South Main street, and prescribing a permanent grade for the sidewalk in front of his residence. The gravamen of his complaint is that to raise the sidewalk as proposed by the town would elevate it above the level of his front yard, and thereby not only cause the surface water to flow upon his yard, but would injure the appearance of his residence.

Case Stated.

The right of a municipal corporation, under the authority of its charter, to open, establish, and improve its streets, and to make, improve, and grade its sidewalks, is too well settled, not only by the authorities generally, but by repeated decisions of this court, to require further discussion. If the corporation, acting in these matters under the powers conferred upon it, exercises reasonable care and skill in the performance of the work resolved upon, it is not answerable to the owner of an adjacent lot, whose land is not actually taken, for consequential damages to his premises, unless there is a provision in its charter or in some statute creating the liability, which it is not pretended exists in this case. Such damage is not an injury, in a legal sense, and the law provides no remedy for it. It is *damnum absque injuria.* 2 Dill. Mun. Corp. (4th Ed.) §§ 987–990; Smith *v.* City Council, 33 Grat. 208; Kehrer *v.* Richmond City, 81 Va. 745; Home Building & Conveyance Co. *v.* City of Roanoke, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551; and Powell *v.* Town of Wytheville, 95 Va. 73, 27 S. E. 805.

Streets—Change of Grade—Liability for Consequential Damages.

If the work is done in the exercise of power conferred upon the municipal body, and is executed in a reasonably proper and skillful manner, the city or town, as the case may be, is exempt from legal liability, although the work may be attended or followed by damage, as a necessary incident, to the owner of an adjacent lot. If it is not so executed, and damage results from the manner of its execution to the owner of an

adjacent lot, such damage is not necessarily an incident to the accomplishment of the work; and the owner in that case has redress against the city or town by an action of tort. Courts of equity have no authority to interfere by injunction with the exercise in good faith by municipal bodies of discretionary powers conferred upon them by law. If damage ensues to the owner of an adjacent lot from the improper or unskillful performance of the work done within the scope of such power, his remedy is by an action at law, and not in equity. Clearly a court of equity could not interfere and restrain the performance of the work upon the apprehension of the owner of the lot that it may not be properly performed. 2 High, Inj. (3d Ed.) §§ 1240, 1242, 1270; 1 Dill. Mun. Corp. (4th Ed.) § 94; Goszler *v.* Corporation of Georgetown, 6 Wheat. 593, 5 L. Ed. 339; and Roanoke Gas Co. *v.* City of Roanoke, 88 Va. 810, 16 S. E. 665.

Same—Same—Negligence—Remedies.

The council of the town of Harrisonburg, by the express provisions of its charter, as amended by Act March 3, 1896 (Acts 1895–96, c. 576, § 24, par. 5), is given the authority "to close or extend, widen or narrow, lay out, graduate, curb and pave, and otherwise improve streets, sidewalks, and public alleys in the town, and have them kept in good order and properly lighted." The grading and laying of the sidewalk in question, as proposed by the council of the town, were thus expressly within the power conferred upon it.

The court, by its decree, not merely perpetually enjoined the town from performing the work in the manner it proposed, but went even further, and fixed permanently what the grade of the sidewalk in front of the residence of the appellee should be, and minutely prescribed the manner in which the town should do the work. This was plainly beyond the jurisdiction and power of the court. The result of such interference by a court of equity would be to control absolutely the council of a city or town in the exercise of the legislative functions plainly conferred upon it by the charter of the

Same—Same—Equity Jurisdiction.

city or town, and to be exercised by the council according to its discretion; to usurp powers expressly conferred upon the council; and to substitute the discretion of the court in the place of that of the council.

Same—Same—Delegation of Authority.

It was argued in support of the injunction and decree that the council had delegated to the discretion of its street committee the work of raising the sidewalk in front of the residence of the appellee, which discretionary power was vested in the council alone, and was incapable of being delegated by it. The evidence in the cause refutes the contention. The evidence shows that the work of raising the pavement on the west side of South Main street had been completed from Masonic corner to Cochran's shop, which brought it to the line of appellee's lot. At this stage, as appears from the minutes of the council, upon a report made to it by the street committee it ordered that "the sidewalk on the west side of Main street, from shop occupied by James Cochran to Bruce street, be raised to the proper level as soon as practicable,—estimated costs, $60." The effect of this order was to direct that the sidewalk in front of the residence of the appellee be raised, and by "proper level" was plainly meant that it be raised to correspond with the level of the work that had been completed from Masonic corner to Cochran's shop. The council ordered the work to be done, prescribed how it should be done, and left its execution to the street committee. This was no undue delegation of power. Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. Ed. 659; and 1 Dill. Mun. Corp. (4th Ed.) § 96.

Estoppel.

It was further contended that the town was estopped from raising the sidewalk in question by reason of a decree of the circuit court in a former suit between it and the appellee. It appears from the record that an injunction was awarded the appellee to restrain the town "from prosecuting further the work upon the streets and crossings at the intersection of Main and Bruce streets." The injunction was awarded June 28, 1884, to take effect

when a bond in a penalty prescribed was given. The bond was not given until March 22, 1894, nearly 10 years after the injunction was awarded. In the meantime the town had gone ahead and executed the work sought to be enjoined. The case was heard, and the injunction perpetuated by a decree entered April 13, 1895,—years after the completion of the work. The decree in that case cannot serve as an estoppel against the town in this suit. Whether, as contended by counsel for the town, the court was without jurisdiction in that case, because the town was never served with process and did not voluntarily appear, or the court had no jurisdiction over the subject-matter, and that its decree was therefore void, it is unnecessary to inquire. It is sufficient to say that the subject-matter of the two suits is different,—the issues not the same. That suit was to prevent the further prosecution of the work upon which the town was engaged at the intersection of Main and Bruce streets, which was making a fill in and raising Bruce street and the crossing at its intersection with Main street. This suit is to restrain and prevent the town from raising and grading the sidewalk on the west side of South Main street, in front of the appellee's lot. The two suits present separate and distinct issues. The work enjoined in the former suit was long ago completed, and that controversy ended. This suit is to prevent work since resolved upon by the town, of a different kind, and not at the same place. The doctrine of estoppel is inapplicable. Dillard *v.* Dillard (Va.), 34 S. E. 60, and cases there cited.

The decree of the circuit court must be reversed, the injunction dissolved, and the bill dismissed.

## RICHARDSON

*v.*

## INHABITANTS OF TOWN OF DANVERS.

(*Supreme Judicial Court of Massachusetts, June 21, 1900.*)

**Whether Bicycle a Carriage—Statute.***—A bicycle is not a carriage, within the meaning of Pub. St. C. 52, § 1, of Massachusetts, providing that highways and other ways named shall be kept in repair, at the expense of the town, city, or place where they are situated, "so that the same may be reasonably safe and convenient for travelers, with their horses, teams, and carriages at all seasons of the year.

EXCEPTIONS by defendant from Essex county superior court. *Sustained.*

*H. P. Moulton*, for plaintiff.

*Daniel N. Crowley*, for defendant.

LATHROP, J. The plaintiff, while riding a bicycle on a highway which the defendant was bound to keep in repair, encountered a depression in the way, and fell from her wheel and was injured. The jury returned a verdict in her favor, and the case comes before us on several exceptions to the exclusion of evidence, and to the refusal of the court to rule that a bicycle is not a carriage, within the meaning of Pub. St. c. 52, § 1. The statute in question provides that highways and other ways named shall be kept in repair, at the expense of the town, city, or place where they are situated, "so that the same may be reasonably safe and convenient for travelers, with their horses, teams, and carriages at all seasons of the year." This statute was enacted in 1786, and has been in force ever since. St. 1786, c. 81, § 1; Rev. St. c. 25, § 1; Gen. St. c. 44, § 1; St. 1877, c. 234. The question,

*See Leslie *v.* Grand Rapids (Mich.), 1 Mun. Corp. Cas. 683.

then, is whether a bicycle is a carriage, within the meaning of this term in the statute. We have no doubt that for many purposes a bicycle may be considered a vehicle or a carriage. It may be lawfully used on the highway, and is subject to the law of the road. State *v.* Collins, 16 R. I. 371, 17 Atl. 131, 3 L. R. A. 394; Myers *v.* Hinds, 110 Mich. 300, 68 N. W. 156, 33 L. R. A. 356; Taylor *v.* Traction Co., 184 Pa. St. 465, 40 Atl. 159; Thompson *v.* Dodge, 58 Minn. 555, 60 N. W. 545, 28 L. R. A 608. So, under a law prohibiting a person from riding or driving any sort of carriage furiously. Taylor *v.* Goodwin, 4 Q. B. Div. 228. So, under laws or ordinances prohibiting driving on the sidewalk. Reg. *v.* Justin, 24 Ont. 327; Mercer *v.* Corbin, 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221; Com. *v.* Forrest, 170 Pa. St. 40, 32 Atl. 652, 29 L. R. A. 365. Under a law permitting the collection of tolls on a turnpike, a bicycle was held to be a carriage. Geiger *v.* Turnpike Road, 167 Pa. St. 583, 31 Atl. 918, 28 L. R. A. 458. The opposite was held in Williams *v.* Ellis, 5 Q. B. Div. 175, and in Murfin *v.* Plank-Road Co., 113 Mich. 675, 71 N. W. 1108, 38 L. R. A. 198. And in Scotland, in an action on a policy of insurance, it was held that a person riding a bicycle was not "traveling as a passenger in an ordinary vehicle." McMillan *v.* Insurance Co., 4 Scots L. T. 96. The statute in question was passed long before bicycles were invented, but although, of course, it is not to be confined to the same kind of vehicles then in use, we are of opinion that it should be confined to vehicles *ejusdem generis*, and that it does not extend to bicycles. This view is favored by the provision in Pub. St. c. 52, § 18, which provides that no damage shall be recovered "by a person whose carriage and the load thereon exceeds the weight of six tons." The words last quoted were first added by St. 1838, c. 104. It seems to us that the legislature, by the use of the word "carriage," had in view a vehicle which could carry passengers or inanimate matter, not to exceed, with its load, more then six tons. As was said in State *v.* Missouri

Pac. Ry. Co., 71 Mo. App. 385, 393: "While the terms in question are flexible, and may include the new uses, falling within the legitimate scope of their meaning, which arise in the growth of society, we are not warranted in giving them a new meaning so as to cover different subjects, not within the principle upon which they are founded. To do this would be judicial legislation." A bicycle is more properly a machine then a carriage, and so it is defined in Murray's Dictionary. It is also so considered in St. 1894, c. 479, which is an act to regulate the use of bicycles and similar vehicles, and in the amendatory act of 1898 (St. 1898, c. 121). A bicycle is of but little use in wet weather or on frozen ground. Its great value consists in the pneumatic tire, but this is easily punctured, and no one who uses a wheel thinks of taking a ride of any distance without having his kit of tools with him. A hard rut, a sharp stone, a bit of coal or glass, or a tack in the road may cause the tire to be punctured, and this may cause the rider to fall and sustain an injury. It would impose an intolerable burden upon towns to hold them bound to keep their roads in such a state of repair and smoothness that a bicycle could go over them with assured safety. It is because ordinary roads are not considered suitable for bicycles that cities and towns are given the power by St. 1898, c. 351, to lay out, construct, and maintain paths for bicycles. And St. 1899, c. 474, makes it a misdemeanor to trespass upon a cycle path by driving thereon with a horse or other animal, except to cross the same. We are therefore of opinion that a bicycle is not a "carriage," within the meaning of that term in Pub. St. c. 52, § 1. This view of the case renders it unneccessary to consider the other exceptions. Exceptions sustained.

## CITY OF GRAND RAPIDS

*v.*

## DE VRIES.

(*Supreme Court of Michigan, April 3, 1900.*)

**Removal of Garbage—Penal Ordinance.**—The ordinance in question, providing for the collection and removal of garbage and offal and for the punishment of any one violating any of its provisions, was not in excess of a charter provision empowering the city council to prevent nuisances, and to provide for the collection and removal of substances actually unwholesome or nauseous; as the words "garbage" and "offal" were defined in the ordinance to include only "refuse" animal and vegetable matter.

**Same—Same.**—Such ordinance was not subject to the objection that it attempted to regulate in any manner the disposition of wholesome substances by the householder.

**Same—Same.**—Such ordinance was not unreasonable in requiring that such refuse should be collected and removed in covered water-tight vessels, and that the vehicles used in its transportation should be so marked as to show the purpose for which they were used.

**Same—Same—Exclusive Contract—Monopolies—Police Power.***—The collecting and removal of such refuse matter in a municipal corporation is not a trade, business, or occupation in any proper sense, and does not come under the doctrine in reference to monopolies, or in reference to legislation in restraint of trade, but is a subject which may be regulated under the police power, and such ordinance was not invalid because it provided for the granting of an exclusive contract for the removal of such refuse matter to one licensed scavenger in each garbage district.

**Same—Ordinance—Prosecution—Validity of Contract.**—Whether such a contract was void for the reason that it was for a longer period than one year, was immaterial in a prosecution, under such ordinance, of a person for collecting and removing such refuse without a license, and at a time when there was a duly licensed person to do the work.

EXCEPTIONS by defendant from Grand Rapids superior court. *Affirmed.*

*See note at end of case.

City of Grand Rapids *v.* De Vries

*G. H. Albers* (*Taggart & Denison*, of counsel), for appellant.

*Lant K. Salsbury*, *City Atty.*, and *Frank W. Hine*, *Asst. City Atty.* (*Edwin F. Uhl* and *Wm. Wisner Taylor*, of counsel), for appellee.

LONG, J. Respondent was convicted under a complaint charging that he "did unlawfully and willfully engage in collecting and removing in open vessels and in an open wagon garbage, offal, and other refuse matter from various residences in the city of Grand Rapids, without being authorized so to do by a license for that purpose, issued by the mayor of said city; contrary to the provisions of an ordinance," etc. The cause was tried before a jury in the recorder's court, and a verdict of guilty found.

Case Stated.

The ordinance under which the prosecution was had reads as follows:

"Section 1. The board of health of the city of Grand Rapids shall have charge, management and control of the garbage burner or cremator owned by the city of Grand Rapids, and the regulation of the cremation of garbage and other refuse matter; and for that purpose shall have power to employ such necessary help as may be required to do the work connected therewith, at such salaries as may be fixed by the common council of the said city of Grand Rapids, and the number of such employees shall be sanctioned and determined by said common council.

"Sec. 2. It shall be unlawful for any person residing within the limits of the city of Grand Rapids or elsewhere to deposit, throw or place any garbage, offal or dead animals in any lane, alley, street or other public place within the city of Grand Rapids; nor shall any person place any garbage, offal, dead animals or other refuse matter upon any private property, whether owned by such person or not, unless the same shall be enclosed in proper vessels or tanks; such vessels or tanks to be perfectly water-tight, and

so kept, with tightly fitting covers, which covers shall not be removed except when absolutely necessary; and such vessels or tanks shall be kept in the rear of the house or in the basement, area or passageway, so as to be readily accessible for collection, and never upon the street, alley, sidewalk or other public place; and all such tanks or vessels shall be promptly delivered to the collector when called for, and shall be returned by him to said place or places without unnecessary delay, and no person except for such purpose shall in any manner interfere with said vessels or tanks or with the contents thereof: provided, however, that this section shall not apply to any person who immediately destroys, by cremation or otherwise, satisfactorily to the said board of health, such garbage, offal, and refuse matter.

"Sec. 3. The words 'garbage' and 'offal' as used in this ordinance shall be held to include every refuse accumulation of animal, fruit or vegetable matter, liquid or otherwise, that attends the preparation, use, cooking, dealing in or storing of meat, fish, fowl, fruit or vegetables. And it shall be unlawful for any person to place in said vessels or tanks any ashes or soil.

"Sec. 4. Said board of health is hereby authorized and empowered to enter into a contract with any suitable person or persons for the purpose of furnishing proper vessels or tanks for the reception of garbage, offal and all other refuse matter, and for furnishing the necessary vehicles for collecting and removing the same, in the manner directed by said board. Said board of health shall have the power to make such rules, regulations and requirements to be contained in said contract as said board may from time to time deem for the best interests of the city; and said board may also divide said city into convenient garbage districts, and shall have the power to regulate the gathering of night soil and the collecting and conveying of dead animals, garbage, slops and offal to the cremator, to be delivered at such place as may be directed by said board. The person

thus entering into contract for the collection and removal of such garbage, offal, dead animals and other refuse matter as hereinbefore stated shall, upon the recommendation of the said board of health, receive a license for that purpose, issued by the mayor of said city, and no license shall be issued to any other person, firm or corporation for the gathering of such garbage; and such person so licensed shall give a bond to the city of Grand Rapids, with sufficient sureties and in such amount as may be required by said board of health. The condition of such bond shall be that said person so licensed shall in all things carry out the provisions of the contract thus entered into between himself and the board of health, acting for the said city, and such rules and regulations as may from time to time be made by said board of health.

"Sec. 5. The scavenger thus licensed as hereinbefore stated shall receive no compensation from the city of Grand Rapids, but shall be permitted to make such arrangements with the citizens of the said city in the various districts that may be established by said board of health, for the furnishing of proper vessels or tanks, at theexpense of said scavenger, for the reception of garbage and for the removal thereof from the premises of the owner or occupant of property to the cremator: provided, however, that the patrons so furnishing garbage as aforesaid shall not be subjected to a weekly charge of more than ten cents for each household and not more than one dollar a week for each hotel, restaurant or boarding house. And said licensed scavenger shall gather said garbage and other refuse matter, herein provided to be conveyed to the cremator, as often as the board of health shall direct.

"Sec. 6. The person so licensed and authorized, as hereinbefore stated, in collecting and removing garbage and all other refuse matter as aforesaid shall, where said vessels or tanks as hereinbefore mentioned are not capable of holding such refuse matter, provide a proper vehicle which shall be watertight, and kept so, and covered on top, so as to prevent the contents or any odor escaping therefrom, and when un-

loaded said box or vehicle shall be thoroughly washed and disinfected; and when conveying said matters shall be so loaded and removed that none of the contents shall fall upon the ground or spill therefrom; and all vehicles used for the collection of garbage shall have attached thereto on both sides a sign with the words 'Garbage Wagon' painted thereon, together with the number of the wagon, in black letters not less than four inches in height on a white ground.

"Sec. 7. Any and every person or persons failing to comply with the provisions of this ordinance, or of the rules and regulations made under and by virtue of the same, shall, for every such offense, upon conviction thereof, be subject to a fine of not less than one dollar nor more than twenty-five dollars and costs of prosecution, or by imprisonment at hard labor in the common jail of the county of Kent, or in any penitentiary, jail, workhouse or house of correction of said city, in the discretion of the court or magistrate before whom a conviction may be had, for a period of not less than five days nor more than ninety days; and in case such court or magistrate shall only impose a fine and costs, the offender may be sentenced to be imprisoned at hard labor in the common jail of Kent county, or in any penitentiary, jail, workhouse or house of correction of said city until the payment of such fine and costs, for a period of not less than five days nor more than ninety days.

"Sec. 8. That any ordinance or part of ordinance conflicting with the provisions of this ordinance be, and the same is hereby, repealed so far as the same affects this ordinance."

On the trial it was shown that an agreement in writing was entered into on July 26, 1898, between the board of health of said city and one Charles E. Herrington, as follows: "Articles of agreement, made and entered into this 26th day of July, A. D. 1898, by and between the city of Grand Rapids, a municipal corporation, of the county of Kent, and state of Michigan, as party of the first part, and Charles E. Herrington, of said city of Grand Rapids, county and state aforesaid, party of the second part, as follows: Said party of the

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first part, by and through its board of health, in accordance with the provisions of an ordinance entitled 'An ordinance providing for the regulation, collection, removal and cremation of garbage, offal, dead animals, and other refuse matter, and for the regulation of the crematory in the city of Grand Rapids' passed July 14, 1894, hereby recommends the said party of the second part to receive a license for the purposes named in said ordinance, and recommends that said license be issued by the mayor, in accordance with section four thereof; and further agrees that said party of the second part shall have the exclusive right under this agreement and under said ordinance to carry out in full the terms of said ordinance and the agreements herein contained. And said party of the first part, by and through its said board of health, hereby agrees that said party of the second part shall have such exclusive right, as hereinbefore stated, for the period of three years from and after the date hereof, and that at the end of said period of three years said party of the first part shall, at its option, either buy from the said party of the second part his entire outfit necessarily used by him in the carrying out of the provisions of said ordinance at a value to be placed thereon by two disinterested persons, or shall extend the contract for a period of two years from and after said date on the same terms and conditions herein named. Said party of the second part, in consideration of receiving such license for the exclusive right to gather garbage, as provided for in said ordinance, and as said ordinance may from time to time be amended for the public good, agrees to procure all the necessary galvanized iron cans or receptacles, which shall be water-tight, and have water-tight covers fitting thereon, and also all the necessary horses, wagons, and harnesses, tools, and other implements necessary to be used in connection with the proper gathering and conveying of garbage, night soil, dead animals, and all other refuse matter, to the satisfaction of the said board of health; and such wagons shall be numbered, and the city may be divided into districts by said board of health; and said second party in

such case agrees to furnish the number of the wagon or wagons in each of such districts to the health officer of said board of health as the said board of health may from time to time redistrict and request. Said material so gathered by said second party shall be gathered as often as the board of health shall, from time to time, deem necessary for the health of the city in the different districts or parts thereof. And the receptacles or cans so furnished shall be in duplicate, and of a sufficient size for use at the different places where such garbage or other refuse is taken from. Said party of the second part is to deliver said material so gathered at such point near the crematory as said board of health shall designate, or at such other place as said board of health may, from time to time, direct, within a reasonable distance therefrom. Said party of the second part further agrees to conduct the business required by this contract in a careful manner, and observe said ordinance and all other ordinances of said city in reference to health matters, and his work shall be done to the full satisfaction of the board of health, and under the direction of the health officer of said board; and shall have an office with telephone connections. Said party of the second part agrees on his part not to assign or sublet this contract to any person or persons unless permitted so to do in writing by the board of health first obtained; and shall continue to perform the duties and requirements of this contract for the full term and period named herein, and to pay for all labor and material that may be necessary to carry out and fulfill the terms of this contract, and to save the city harmless from any claim for damages or costs on account of failure to fulfill any part or parcel of this contract. And further agrees for that purpose to execute and deliver to the said city of Grand Rapids a bond in the penal sum of one thousand dollars, with sufficient sureties, to be approved by the board of health, for the faithful performance of this contract." The bond given was also put in evidence, together with the license granted by the mayor to Charles E. Herrington, dated July 29, 1898. Evidence was given tending to show the facts set forth in the

complaint and warrant. After the proofs were closed, counsel moved that the complaint be dismissed, and the respondent discharged.

The proofs showed that the respondent, on February 16, 1899, gathered garbage from several private residences in an open basket, and put such garbage into a sleigh, which was partly open, and so carried the same through the streets of the city; that this garbage was partially decomposed matter, and was deleterious to public health. The respondent testified that he had been in the habit of gathering garbage in the city for the last 12 years; that on the occasion shown by the people he did gather garbage, but that such garbage did not have a bad odor, and that he took it home, and fed it to his hogs. He also testified that he made application for a license to the board of health, which was refused, and that he was at that time told he had no right to gather garbage. The court left it to the jury to determine whether the articles gathered by the respondent came within the definition of garbage mentioned in the ordinance.

The principal objection to the ordinance is that it is invalid, and that the common council was not authorized, under the charter of the city, to adopt the same. The charter of Grand Rapids provides (paragraph 5, § 10, tit. 3): "Fifth: To abate or remove all nuisances of every kind, and to compel the abatement and removal of the same: To order and compel the owner or occupant of any grocery, tallow chandler's shop, butcher's stall or shop, soap factory, tannery, stable, privy, water closet, hog pen, sewer or other nauseous or unwholesome house or place to cleanse, remove or abate the same from time to time, as often as the common council may deem necessary: To direct the location of all slaughter houses, rendering places, markets and market places: To prohibit any person from bringing or depositing any dead carcass or any other unwholesome or nauseous substance within the corporate limits of the city; and if any person shall have on any premises owned or occupied by him, within such limits, any such substances or any putrid meat, fish, hides or skins of

any kind, which are unwholesome, nauseous or offensive, to order and compel the removal thereof; and in case of neglect or refusal of the owner or occupant of such premises to remove or abate the same, to authorize the removal, abatement or destruction thereof by some proper officer of the city. All for the health, comfort, safety and convenience of said city." Paragraph 16, § 10, tit. 3: "Sixteenth: To provide for the preservation of the general health of the inhabitants of said city: To make regulations to secure the same: To prevent the introduction or spreading of contagious or infectious diseases: To prevent and suppress diseases generally: To establish a board of health, and to prescribe and regulate its powers and duties, subject to the provisions of this act: To regulate the burial of the dead, and to compel the return of births and deaths to be made to such board of health and the return of all burial permits to said board: To provide for a complete record of all births, deaths and interments, to be kept in the office of said board of health." Paragraph 18, § 10, tit. 3: "Eighteenth: To pass all needful ordinances and regulations governing sextons and undertakers for burying the dead, and scavengers and chimney sweeps, and regulating their compensation and the fees to be paid by them for licenses." Paragraph 25, § 10, tit. 3: "Twenty-Fifth: To sell or otherwise provide for the disposal of all dirt, filth, manure, cleanings and all other substances lying in or gathered from the highways, streets, avenues, lanes, courts, alleys and public places and public grounds, to be disposed of by the city of Grand Rapids: To sell or otherwise dispose of all earth to be removed from such highways, streets, avenues, lanes, courts, alleys, public places and public grounds of said city in grading, paving or otherwise improving the same." Section 39, tit. 3: "Sec. 39. It shall be the duty of the common council to declare any place, thing or matter, which may be deleterious to public health or dangerous to persons or property, a public nuisance; and when its attention or the attention of its proper officer or officers is called to any such nuisance, it shall immediately proceed to abate the same. It

shall have power to pass all legal by-laws, ordinances or regulations which, in its judgment, it may deem necessary to carry into effect the duties imposed upon it by this section." Section 1, tit. 7: "It shall be the original duty of the common council to adopt all needful measures for the preservation of the public health of the city, and to restrain and prohibit the exercise of any nauseous or dangerous business or avocation within the corporate limits of the city. In furtherance of such original duty and to preserve the public health of the city and to suppress disease therein, there shall be a board of public health in the city, to consist of three members, who shall be electors of the city." Section 7, tit. 7: "It shall be the duty of the common council * * * to abate all nuisances of every description which are or may become injurious to public health, in any manner it may deem expedient, and from time to time perform all acts and make all regulations which it may deem necessary for the preservation of the public health and the suppression of disease in the city, and from time to time to recommend to the common council the passage of such by-laws, ordinances or regulations as it shall deem expedient for the preservation of the public health and the suppression of disease in the city." Loc. Acts 1897, pp. 387–511.

It is contended that there are two reasons why the ordinance cannot be sustained under these charter provisions: (1) That the charter power is confined to nuisances, and to substances which are actually unwholesome or nauseous; while the ordinance extends to all garbage under the very broad definition of that term laid down in section 3, and irrespective of whether the same is a nuisance, or whether it is in fact wholesome or unwholesome. (2) That the power conferred to remove these substances can be exercised only in case of neglect or refusal of the householder to remove them himself; while the ordinance attempts to confer on an individual the right of immediate removal against the protest of the householder, and without giving him an opportunity to make such removal himself; and, if construed as the city now asks, posi-

tively forbids the householder, either personally or by any one employed by him for that purpose, to remove such garbage, and subjects the householder to a penalty if he attempts immediately to remove from his premises entirely wholesome table refuse. We think counsel is in error in both these propositions. The charter provisions empower the council to pass ordinances to regulate the collection, removal, and disposal of garbage, etc. In section 3 of the ordinance the words "garbage" and "offal" are defined to include every refuse accumulation of animal, fruit, or vegetable matter, liquid or otherwise, that attends the preparation, use, cooking, dealing in, or storing of meat, fish, fowl, fruit, or vegetables. These matters in and of themselves are regarded as nuisances; that is, the ordinary and accepted meaning of the words "garbage" and "offal" is such refuse matters that in and of themselves are nuisances. As to the second proposition, it may be said that the ordinance does not attempt to regulate in any manner whatever the disposition of wholesome substances by the householder. It is aimed only at refuse; that is, discarded, worthless matter,—matter unfit for food. The householder has perfect liberty, under the ordinance, to consume, or to sell or give away, all the leavings of his table or kitchen that are fit for food; but he is not supposed by the ordinance to have around his premises in open baskets, pans, pails, or heaps that which is known as "refuse." Matter of this character he is required to care for by depositing the same in water-tight vessels or tanks, and dispose of it in such a way that will not endanger the public health.

Removal of Garbage—Penal Ordinance.

Same—Same.

But counsel says that the ordinance is unreasonable, and therefore void; and that it also creates a monopoly. The same questions were raised in People *v.* Gordon, 81 Mich. 306, 45 N. W. 658. The charter provisions of Detroit were somewhat similar to the charter of Grand Rapids, above quoted. Those provisions empowered the common council of Detroit to enact and provide by ordinance for

Same—Same.

the manner of collecting, transporting, and conveying of garbage and all animal and vegetable matter and refuse in said city, and required all persons to dispose of the same in the manner provided by the common council in said ordinance for the removal and destruction thereof, and imposed penalties for the violation of the same. The ordinance there provided for the collection of garbage in water-tight vessels, the same as the ordinance in controversy. It also provided that no person except the city contractor or his agents should carry or transport garbage through the streets or public places. It was contended that this ordinance was unreasonable. It was said: "We think it was competent for the common council to prescribe reasonably the manner of removing garbage and offal through and out of the city, and that the requirements that such refuse shall be removed in water-tight closed carts or wagons, and that the same shall be marked 'Garbage,' are reasonable regulations. Gordon did not come within this regulation, and was guilty of violating the ordinance. Had he been provided with a wagon which substantially complied with section 2 of the ordinance, and had he been refused a permit from the health officer for no other reason than that he was not the city contractor, or an agent or employee of such contractor, the interesting question so ably discussed by counsel relative to the authority of cities to virtually grant a monopoly of garbage collection and removal, or to do the whole business through their officials or contractors, would have been before us for determination." In the present case we think the ordinance is not unreasonable as to the manner of gathering and removing garbage. That question is ruled by People *v.* Gordon, *supra*. The charter does not, in express terms, empower the council to grant an exclusive contract. It is contended by counsel for respondent that it is the settled rule of charter construction in this state that, even though a city charter may give the council power of general control over a subject, yet the council cannot make an exclusive contract for a period of years,

Same—Same—Exclusive Contract—Monopolies—Police Power.

relating to that subject, unless such power to make an exclusive contract is stated by the charter in express terms; in other words, that the power to make an exclusive contract will not be implied. In support of this proposition, counsel cite Grand Rapids Electric Light & Power Co. *v.* Grand Rapids Edison Electric Light & Fuel Gas Co. (C. C.), 33 Fed. 659. The question of the granting of the exclusive use of the streets of Grand Rapids to the electric light company was very fully discussed by MR. JUSTICE JACKSON in that case, and he states the well settled doctrine that municipal corporations, which are mere political agencies of government, forming but parts of the machinery employed in carrying on the affairs of state, possess and can exercise only such powers as are granted in express words, or those necessarily or fairly employed in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation; not simply convenient, but indispensable. Applying this rule to the ordinance there under consideration, he held that there was no express power given by the charter by which the common council of Grand Rapids could confer upon the Grand Rapids Electric Light & Power Company the exclusive use of the streets for 15 years. The learned judge said in that case: "I cannot discover, in the decisions of the Michigan supreme court, any general policy of the state in respect to municipalities and their powers which may be legitimately invoked in support of the validity of the ordinance of 1880, so far as it attempts to grant the exclusive use of city streets to complainant for the purposes aforesaid." We think that case is not controlling of the present. The gathering of garbage is not a trade, business, or occupation in any proper sense, and such employment does not come under the doctrine in reference to monopolies, or in reference to legislation in restraint of trade. It is a matter in which the public agencies are authorized to pursue the best means to protect the public health. The charter provisions recognize the fact that certain matter may be deleterious to public health, and dangerous to persons or

property, and thus become a public nuisance; and the ordinance makes it the duty of the common council to declare any place, thing, or matter which may be deleterious to public health, or dangerous to person or property, a public nuisance; and the council is given power to abate such nuisance. The ordinance treats garbage or offal as deleterious to public health, and directs the manner of its disposition for the benefit of the public health. It is one of the police regulations of the city for the benefit of the public health.

Whether or not the contract with Herrington be invalid for the reason that it is for a longer period than one year is of no importance here. The ordinance itself does not attempt to provide that the board of health may enter into a contract for a longer period than one year. It is true that the board attempted to do so by providing that Herrington should have the exclusive right for the period of three years, with the option of two more years, the license to be issued from year to year; but whether the contract be valid or not cannot affect the rights of the respondent. He was acting without a license, and at a time when there was a duly-licensed person to do the work.

Same—Ordinance—Prosecution—Validity of Contract.

The respondent asserts that the ordinance does not license or control, but prohibits what he denominates a lawful and proper business. The business of handling and carting garbage through the public streets of a city is a business which a municipality may regulate for the benefit of the public health. No person has the right to carry garbage or other refuse matter through the streets of a city in open vessels. It is not the creation of a monopoly when the city from year to year licenses one or more persons to cart such garbage from and out of the city, specifying the manner in which it shall be done. In Rendering Co. *v.* Behr, 7 Mo. App. 345, the ordinance under consideration was in reference to the removal of dead animals. The court, speaking of that ordinance, said: "The city authorities would be grossly derelict if they left the chances of the removal to be

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determined by the owners of the animals, or by possible purchasers. They are in duty bound to appoint special agencies for the purpose, and to render performance certain by whatever means their judgments may suggest. If they find that this certainty can be secured only by confining the agencies to a single person or corporation, upon terms of responsibility for failure to conform, it is their duty and their privilege to secure it. The agencies are appointed rather as the instrument in the hands of the municipal authorities for the fulfillment of the public duty than the beneficiary of an exclusive privilege." We think the ordinance a valid one, and the conviction must be affirmed. The other justices concurred.

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NOTE.

**Grant of Exclusive Privilege for Removal of Garbage—Validity.**—The constitutionality of an ordinance providing for an exclusive contract for the removal of garbage was upheld in Smiley *v.* McDonald, 42 Neb. 5; River Rend. Co. *v.* Behr, 7 Mo. App. 345; Alpers *v.* San Francisco City & County, 32 Fed. Rep. 503. See also State *v.* Payssan, 47 La. Ann. 1029. See, *contra*, Russel *v.* Erie (C. P.), 8 Pa. Dist. Rep. 105, in which case it was held that such an ordinance was void as creating a monopoly, and also as depriving the citizens of their property without due process of law.

An ordinance creating the office of city scavenger and prohibiting the performance of scavenger work by any unlicensed person is authorized by a statute conferring on the city general power to care for the health, safety and comfort of its citizens by ordinance. City of Ouray *v.* Carson (Colo. App.), 59 Pac. Rep. 876.

A city has the power, under a charter provision authorizing it to regulate by ordinance the collection and removal of garbage, to pass an ordinance prohibiting such collection or removal by unlicensed persons. State *v.* Orr, 68 Conn. 101, 35 Atl. Rep. 770, 34 L. R. A. 279.

An ordinance and a contract in furtherance thereof, providing in substance that garbage shall be collected and taken away by a licensed agent of the city; that householders producing the garbage shall place the same in proper receptacles convenient for removal, and that the agent shall charge the householder for such removal a price fixed in the contract between him and the city, is a valid exer-

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use of the police power, and such ordinance and contract are both within the clearly recognized lines of the police power, being simply a sanitary regulation, and not in the nature of a confiscation or an attempt to create a monopoly. Walker *v.* Jameson, 46 Am. & Eng. Corp. Cas. 551, 140 Ind. 591.

In Boehm *v.* Mayor, etc., 61 Md. 259, it was held that the city, under the power to preserve the health and safety of its inhabitants, had the undoubted right to pass ordinances creating boards of health, appointing health commissioners, with other subordinate officers, regulating the removal of house dirt, night soil, refuse, offal, and filth by persons licensed to perform such work, and providing for the prohibition, abatement, and suppression of whatever was intrinsically and inevitably a nuisance.

The case of *In re* Vandine, 6 Pick. 187, directly adjudges that a by-law of the city of Boston prohibiting any one not licensed by the city from removing house dirt and offal from the city is valid. In ruling upon this question, the court said: "The great object of the city is to preserve the health of the inhabitants. To attain that, they wisely disregard any expenses which are deemed to be requisite. They might probably have these offensive substances carried out of the city without any expense, if they would permit the people from the country to take them away at such times and in such manner as would best accommodate them. Every one will see that, if this business were thus managed, there would be continual moving nuisances at all times, and in all the streets of the city, breaking up the streets by their weight, and poisoning the air with their effluvia. * * * It seems to us * * * that the city authority has judged well in this matter. They prefer to employ men over whom they have entire control by night and by day, whose services may be always had, and who will be able, from habit, to do this work in the best possible way and time. Practically, we think the main object of the city government will be better accomplished by the arrangement they have adopted than by relying upon the labor of others, against whom the government would have no other remedy than by a suit for a breach of contract. The sources of contagion and disease will be speedily removed in small loads, which will not injure the pavements nor annoy the inhabitants. We are satisfied that the law is reasonable, and not [illegible] within the power of the government to prescribe, but well adapted to preserve the health of the city."

In Kerr Rendering Co. *v.* Behr, 77 Mo. 91, 4 Am. & Eng. Corp. Cas. 30, 46 Am. Rep. 11 it was held that under the constitution of the state of Missouri a city ordinance is void which undertakes to confer upon one person the right to remove and convert to his own use the carcasses of all dead animals, not slain for food, found within

the limits of the city, to the exclusion of the right of the owners of the same to remove and use them before they become a nuisance. *Compare* State *v.* Fisher, 52 Mo. 177. In People *v.* Gordon, 81 Mich. 306, the court upheld an ordinance requiring that water-tight closed carts or wagons, marked "Garbage" should be used for the removal of garbage.

Such an exclusive contract has been upheld as against the city. Louisville *v.* Wible, 84 Ky. 290. See also Swift *v.* New York, 83 N. Y. 528. Where the owner has the option of removing the dead animal himself, an ordinance granting the exclusive right of removing such animals is not invalid. Nat. Fertilizer Co. *v.* Lambert, 48 Fed. Rep. 458.

In Lowe's Case 54 Kan. 757, 27 L. R. A. 545, the court, having under consideration an ordinance providing for the appointment of city scavengers and prohibiting any person from engaging in scavenger work without a license, said: "The power of the city council to license and regulate the business of scavengers is not now questioned, nor, in view of the express authority contained in the statute * * * can there be any question of their power to make and enforce all reasonable rules and regulations for the conduct of this disagreeable business. Under the authorities, and especially in view of the constitutional provision quoted, these regulations must leave a way open to every person who will comply with the requirements of the ordinance to engage, at least, in so much of the business of scavengers as relates to entering on private property, and removing filth and garbage therefrom. This ordinance clearly authorizes the restriction of this business to two persons, to be selected by the mayor, thereby providing for a monopoly. This the mayor and council had no power to do."

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STATE

*v.*

HILL.

(*Supreme Court of North Carolina, June 14, 1900.*)

**Scavengers—Reasonableness of Ordinance.***—A city ordinance to regulate the performance of scavenger work must be reasonable in its provisions, and not unnecessarily interfere with natural rights.

*See City of Grand Rapids *v.* De Vries (Mich.), *ante* and *note*.

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In River Rendering Co. *v.* Behr, 77 Mo. 91, 4 Am. & Eng. Corp. Cas. 320, 46 Am. Rep. 6, it was held that under the constitution of the state of Missouri a city ordinance is void which undertakes to confer upon one person the right to remove and convert to his own use the carcasses of all dead animals, not slain for food, found within

the limits of the city, to the exclusion of the right of the owners of the same to remove and use them before they become a nuisance. *Compare* State *v.* Fisher, 52 Mo. 177. In People *v.* Gordon, 81 Mich. 306, the court upheld an ordinance requiring that water-tight closed carts or wagons, marked "Garbage" should be used for the removal of garbage.

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State v. Hill

If it does interfere with such rights, the public necessity must appear. And an ordinance which, if enforced, would have the effect of preventing, without apparent necessity, the performance of necessary scavenger work for one individual, even by him, and under which a licensed scavenger cannot do the work oftener than once a month without an order from the superintendent of health, is unreasonable.

APPEAL by defendant from New Hanover county superior court. *Reversed.*

*L. V. Grady*, for appellant.

*The Attorney General*, for the State.

DOUGLAS, J. This is a criminal action originally begun in the mayor's court of the city of Wilmington, wherein the defendant is charged with doing "scavenger work for pay at the surface closet of W. S. Royster without having license to do such scavenger work, and not being employed by the licensed scavenger of the city" of Wilmington. The closet is thereafter referred to as belonging to Niestle. The following are the admitted facts: That in January, 1899, the defendant made a contract with William Niestle to do his scavenger work for the term of one year by cleaning the closet at his store once a week, and that at his residence once every two weeks; that he was to receive 15 cents each time for cleaning the store closet and 25 cents for the residence closet; that he continued to do this work without license, after the passage of the ordinance, and that when the contract was made no license was required, and any one was at liberty to contract for such work. The city ordinance was introduced providing that the city shall be divided into eight sanitary districts; that "persons proposing to do scavenger work of one or more districts shall submit bids for doing the work for a term of one year"; that "the board of health may refuse any and all bids for scavenger work, and shall have power to decide who are competent bidders"; that in case of disagreement between the owner or occupant and the scavenger as to the work having been properly done, the question shall be referred to the superintendent of health; that "all closets must be cleaned

at least once a month, and more frequently if ordered by the superintendent of health"; that "the charges for cleaning closets shall be governed by the previous going rates, and shall not exceed twenty-five cents per closet in the First, Second, Seventh, and Eighth, and in the Third, Fourth, Fifth, and Sixth districts east of Tenth street, and shall not exceed fifty cents in the Third, Fourth, and Sixth districts west of Tenth street." W. R. Slocum testified for the state as follows: "I am the regular licensed scavenger for the city of Wilmington, and the defendant was not working under me at the time he was charged with doing scavenger work without license. I am the only licensed scavenger in the city of Wilmington. I do not receive any pay from the city of Wilmington for my work. I collect of the parties for whom I do scavenger work. I have done it, and pay a certain per cent. of the proceeds of such work for same. I do not know what per cent. I pay. Do not know whether I pay 10 per cent., 25 per cent., or 50 per cent. There are no public sewers in the city of Wilmington." It does not appear what were the charges of the city scavenger, but we presume they were the full amounts allowed, as our attention has not been called to any instance where a municipal contractor holding an exclusive privilege has charged less than the maximum allowed by his contract. We do not say that there are no such cases, but their whereabouts are unknown to us. The real point in the case is not very clearly presented by the prayer for instruction, but it clearly appears from the case itself. The prisoner is not charged with carrying on the business of a public scavenger, but simply with doing the work for one man; and it is admitted in the argument that the effect of the ordinance would be to prevent the owner himself from removing the refuse from his own premises. This is clearly an interference with a natural right, and, while this may be allowable on the ground of public necessity, some such necessity must appear, and the ordinance must be reasonable in its provisions. State

*v.* Higgs (N. C.; at this term), 35 S. E. 473; 1 Dill. Mun. Corp. (4th Ed.) § 319; 2 Wood, Nuis. (3d Ed.) § 745; Mayor, etc, *v.* Redecke, 49 Md. 217. Is the ordinance under consideration reasonable in its provisions, or just in its results? We are compelled to think that it is not. It takes away from the citizen a natural and a necessary right without apparent necessity, and substitutes nothing adequate to take its place. The owner cannot clean his own premises, no matter how filthy they may become, and the public scavenger cannot be made to clean them oftener than once a month without an order from the superintendent of health. This case does not question the right of the city to clean all closets, or to have them cleaned or kept clean; but it involves the right of the owner himself to clean up. If the ordinance has that effect,—and the state claims that it has such an effect,—then it is void, at least *pro tanto*. In this particular the effect of the ordinance is not to keep the city clean, but rather to keep it dirty, for the time being. It is a matter of common knowledge that refuse matter quickly decays during the summer months, and it can scarcely be contended that merely a monthly cleaning is sufficient to keep a closet in a healthy condition in a warm climate. Are the rates allowed to the public scavenger reasonable? If the ordinance were otherwise valid, we would hesitate to interfere with it on this ground alone, and we do not decide it as a matter of law; but to us it seems questionable. What is meant by the words in section 7 of the ordinance, "shall be governed by the previous going rates," is unknown to us, and we have not been favored with any explanation either in the record or the argument. We assume that the scavenger would be entitled to charge 25 or 50 cents, as the case might be, for each time a closet was cleaned. The result to Niestle would be that to have his work done by the city scavenger would cost him at least $19 50, and possibly $39, according to his location. It is now costing him $14 by private contract. The result of the ordinance would be that any one who lived in the humblest

cabin in the furthest corner of the city would be compelled to pay at least $3 a year for the privilege of having a closet, and much more if he wished to keep it in a decent condition. No matter how humble he may be, or how willing to do the most menial labor, he would be compelled to employ the city contractor to clean his own premises, and, of course, to pay him at the contract rates. As bearing somewhat on the rate of compensation, we are informed that the city of Raleigh charges a license tax of one dollar per year for each surface closet, and keeps it clean without further expense to the owner. We do not know the relative expense of performing such duties in Raleigh and in Wilmington, nor is it within our province to inquire, but such gross disparity might well be questioned on the ground of fairness or necessity. In the case at bar the defendant could not have obtained a license, even if he had applied for one, as the city was all under contract. Had it not been, he would not have been licensed as a scavenger unless he had bid for an entire district. Even then he had no assurance of obtaining it, no matter how low he bid, as the board of health retained the right to refuse any and all bids, and to "decide who are competent bidders." The public scavenger was not required to do any special duty, or to perform his duty in a special manner. He was not required to use carts or implements of any special kind, or to use any special precautions either for cleanliness or disinfection. As far as we can see from the record, the defendant was fully as well equipped for such work as the city scavenger himself, who, indeed, does not appear to have performed any personal duties other than perhaps making certain reports, or possibly superintending those who were working for him on shares.

We will briefly examine the authorities that have been cited in support of the contention of the state, none of which are strictly applicable in our view of the case. In State *v.* Hord, 122 N. C. 1092, 29 S. E. 952, the court says, on page 1094, 122 N. C., and page 953, 29 S. E.: "Of that the commissioners, the local legislature, are the sole judges,

unless their ordinance is unreasonable." Hill *v.* City of Charlotte, 72 N. C. 55, simply holds that a municipal corporation is not liable to an action for damages in the exercise of discretionary powers. In *Re* Vandine, 6 Pick. 187, while the court recognized the power of the city to require public scavengers to take out a license, it held that the ordinance must be reasonable. It says, on page 191: "To arrive at a correct conclusion whether the by-law be reasonable or not, regard must be had to its object and necessity." And again, on page 192: "We are all satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city." In Com. *v.* Stodder, 2 Cush. 562, the court says, on page 571: "We cannot doubt that a by-law reasonably regulating the use of the public streets of the city * * * would be valid and legal." It then concludes, on page 576, as follows: "A by-law to that effect is an unnecessary restraint upon the business of those carrying passengers for hire, and not binding upon inhabitants of other towns. For this reason the by-law must be held invalid as respects the defendant." The case of Boehm *v.* Mayor, etc., 61 Md. 259, which at first glance seems to fit our case, has really no direct bearing. There the action was brought by a public scavenger to recover from the mayor and city council of Baltimore damages alleged to have resulted from their wrongful act in suspending and revoking his license. The court held that the city had the power to pass reasonable by-laws requiring a license from a public scavenger, and requiring all refuse matter to be carried off in carts of a certain character; that such by-laws were reasonable, and that the plaintiff could not recover damages for the revocation of his license. The court, in its opinion, distinguishes this case from that of Mayor, etc., *v.* Radecke, 49 Md. 217, in which certain ordinances of the city of Baltimore were held unreasonable and invalid. In City of Louisville *v.* Wible, 84 Ky. 290, 1 S. W. 605, the court held that the city could not, upon its mere caprice, or to gain a pecuniary

advantage, violate a contract which it had made upon a valuable consideration with an individual, whereby it granted to him the exclusive right for five years to the use of its streets for the purpose of removing the bodies of all dead animals from its streets, alleys, etc. The second headnote of that case is as follows: "The exclusive privilege of hauling the bodies of dead animals out of a city along its streets, having been granted by the city to an individual, others cannot be allowed to buy up such dead animals, and haul them out along the streets, although the original owners have the privilege of thus removing them:" That case does not appear to be an authority against the right of the owner to remove refuse from his own premises. The Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394, discuss at great length and with great ability the question of monopoly under the fourteenth amendment to the constitution of the United States, but they do not appear to us to directly affect the principle now under consideration; that is, the necessity and reasonableness of the ordinance. We are not disposed to question the law as laid down in 1 Dill. Mun. Corp. §144, as to the duty and power of a municipal corporation to preserve the public health and safety, but by lawful means, and in subordination to the principles enunciated by the same author in sections 319–322, 325. These sections expressly lay down the rule that all ordinances "must be reasonable and lawful; must not be oppressive; must be impartial, fair, and general; and must not contravene common right." But one citation remains to be examined,—that of Brodnax v. Groom, 64 N. C. 244. The subject-matter of that decision was an act of the legislature providing "that the commissioners of the county of Rockingham be and they are hereby authorized to levy and collect a special tax for the purpose of building and repairing bridges in said county." The court says, on page 249: "Repairing and building bridges is a part of the necessary expenses of a county, as much so as keeping the roads in order, or making new roads. So the case before us is within the power of the county commissioners. How can

this court undertake to control its exercise? Can we say such a bridge does not need repairs; or that in building a new bridge near the site of an old bridge it should be erected as heretofore, upon posts, so as to be cheap, but warranted to last for some years; or that it is better policy to locate it a mile or so above, where the banks are good abutments, and to have stone pillars, at a heavier outlay at the start, but such as will insure permanency, and be cheaper in the long run?" This language, half humorous and half sarcastic, was surely never intended to apply to the constitutional rights of the citizen, which are not held at the pleasure of a board of aldermen, or even of the legislature. We do not say that the defendant, or even the owner of the premises, had the right to clean out their closets in a manner offensive to their neighbors, or detrimental to the public health and comfort. They would be subject to such reasonable regulations as were necessary to attain these ends. Nor do we say that the city might not, under reasonable regulations, require any one to take out license before acting as a public scavenger, or even do the work through its own officers. Such cases are not before us. We are constrained to say that the ordinance, construed as it appears to us, is not shown to be reasonable, necessary, or just; and therefore, being in derogation of common right, must be held invalid in its application to the case at bar. Error.

CLARK, J. (dissenting). One of the most urgent causes for the institution of municipal government is the conservation of public health, and no duty more important is confided to municipal bodies. The nature of the ordinances they shall adopt for that purpose is a matter for their discretion, subject to change by the election of a new board, and not reviewable by the courts unless the ordinance is unreasonable. When people assemble in towns, matters of sanitation which are left to each one's own judgment in the country become a matter of public concern. It is a matter of common observation that in this matter of cleaning out

water-closets, cesspools, and sinks, if it is left to each householder, some will be guilty of neglect, to the great discomfort of their neighbors, and often to the detriment of the public health. Hence it has always been recognized that the regulation of that matter rested with the municipal authorities. Code, § 3802, confers on towns and cities the power "to pass laws for abolishing or preventing nuisances and preserving the health of the citizens," and the methods they shall adopt are left (except in cases of abuse) to the "local legislature," the municipal body. State *v.* Hord, 122 N. C. 1092, 29 S. E. 952; Hill *v.* City of Charlotte, 72 N. C. 55. The latter case says that "nothing can be clearer than that it is left entirely to those authorities to determine what ordinances are proper for those purposes." In this matter of the best method of having the scavenger work of the city performed it may be that, if it were for this court to decide, I should agree with the majority that the best method is to have it done directly by the city through its officers and employees. Such is certainly the manifest tendency of the age as to all matters of municipal interest, including the furnishing of light, water, sewerage, street cars, and the like. But it is not a matter committed to us, but to the people of each town and city, to determine through its local board. When any town, as in the present instance, prefers that the scavenger business, whose proper regulation is of the highest local importance, should be performed by licensed scavengers, giving bond for the faithful performance of their duties, and under supervision of the city health officers, there has been no reason shown why it cannot be done. There are ample authorities to that effect. In *Re* Vandine, 6 Pick. 187, as far back as 1828, it was held that a by-law of the city of Boston forbidding any one to remove night soil, etc., unless duly licensed by the city, was valid, though the court there say that in their own judgment it would be better if the city would have the work done directly by its own employees than through contractors. This was cited and approved in Com. *v.* Stodder, 2 Cush.

563. In Boehm *v.* Mayor, etc., 61 Md. 259, it was held that an ordinance that "no person shall remove the contents of any privy, well, or sink within the limits of the city without having first obtained a license so to do," was a valid ordinance under the power "to preserve the health of the city, and to prevent and remove nuisances"; thus coming within the very letter of our Code (section 3802) and the ordinance of the city of Wilmington. In another late case—City of Louisville *v.* Wible, 84 Ky. 290, 1 S. W. 605—it is held that the city can have such or similar work done by contractors, and that it is no objection to the validity of the contract if there is only one contractor. The above doctrines are laid down as well-settled law. 1 Dill. Mun. Corp. § 144, note; *Id.* § 569, and notes. It was held in the Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394 (which is a thorough discussion of the proposition), that contracts of this general nature are not invalid when exclusive, because they are made in consideration of public services; but in this instance, however, there is no exclusive contract. The ordinance requires advertisements for bids, one contractor at least for each of the eight districts, bonds to be given for discharge of duty, supervision by the health officer, and power reserved to the city to cancel and revoke any contract at will, each contract to be renewed annually. The city's interest is fully safeguarded. It is purely incidental that one man has taken all the contracts, and his doing so in no wise invalidates the ordinance. The power being clearly in the municipal body to regulate the scavenger work of the city, whether the method shall be directly by the city or by contract under the license system, is for them to decide. This court cannot review their discretion. This is stated in ever-memorable words by PEARSON, C. J., in Brodnax *v.* Groom, 64 N. C., at page 250.

MONTGOMERY, J., also dissents.

BROWN

*v.*

TOWN OF LOUISBURG.

(*Supreme Court of North Carolina, May 29, 1900.*)

**Personal Injury—Unguarded Pit in Sidewalk—Whether Town and Individual Joint Tort Feasors.***—Plaintiff was injured by falling into a pit dug in a public sidewalk by another person for his own purposes, and negligently left unguarded by the latter. The town's liability for plaintiff's injury arose out of its negligently permitting its sidewalk at that dangerous place to remain unguarded. *Held*, that the person digging the pit and the town were not joint tort feasors.

**Same—Same—Ultimate Liability.***—The person digging such pit would have been liable to the town for any damage recovered against the latter for plaintiff's injury; therefore, plaintiff, by accepting a sum of money in full satisfaction of his claim against such person only, also discharged the town.

APPEAL by defendant from Franklin county superior court. *Reversed*.

*C. M. Cooke & Son*, *W. H. Yarborough, Jr.*, and *W. M. Person*, for appellant.

*F. S. Spruill* and *W. H. Ruffin*, for appellee.

MONTGOMERY, J. This action was brought against the defendants to recover damages for personal injuries sustained by the plaintiff on account of the alleged negligence of the defendant. The defendant Ponton, in building a store within the limits of the town of Louisburg, made a deep excavation, abutting upon the sidewalk; and, after the front wall of the building had been built up to the level of the sidewalk, there was still left a part of the excavation between the front wall and the center of the sidewalk, extending into the sidewalk about two feet. The hole was about two feet in width at the top, but slanting and

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*See notes at end of case.

narrow at the bottom. The town authorities had knowledge of the excavation in the sidewalk. On a dark night the plaintiff, without fault of his own, fell into this excavation, and was badly hurt. The hole was unguarded by rail or otherwise, and no danger signal was displayed. While the action was pending the plaintiff agreed in writing, through his attorneys, for the consideration of $75, "to enter a nonsuit, * * * and to release J. W. Ponton from any and all claims of the plaintiff against J. W. Ponton by reason of the facts set forth in the complaint filed in the above cause, and from any and all claims of every description which the said Shelly Brown may have against the said J. W. Ponton." It was verbally agreed at the time of the execution of the agreement that the payment of the $75 was not made or accepted in full satisfaction of the injuries sustained, but simply to discharge Ponton.

The contention of the plaintiff's counsel is that the defendants are not joint *tort feasors*, but that they were co-trespassers, co-delinquents, co wrongdoers," and that their liability to the plaintiff is not only joint, but several, and that therefore the effect of the contract between the plaintiff and Ponton and the payment of the $75 was only a payment *pro tanto*, which inures to the benefit of the other defendant, the town of Louisburg. It seems to us immaterial, in considering the effect of the contract between the plaintiff and Ponton, whether the defendants were joint tort feasors or co-delinquents, in the sense in which that word is used by the plaintiff's counsel. The defendants were not, however, joint tort feasors. To make persons joint tort feasors, they must actively participate in the act which causes the injury. The town of Louisburg had no active part in the matter of building the house or in creating the nuisance. The authorities of the town knew, or ought to have known, of the excavation in the street; but Ponton did not act under the directions of the corporation, nor were his acts in any way for its benefit. The absence of objection on the part of the town authorities to the defendant Ponton's digging the excavation cannot be consid-

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ered a presumption that the town intended to authorize Ponton to leave the excavation unguarded. Ponton, therefore, was the active wrongdoer in digging a pit on the public street and leaving it unguarded. The town's liability arose out of its negligently permitting its sidewalk at that dangerous place to remain unguarded. The real question in the case is this: Upon which of the defendants is the ultimate liability resting, as between themselves? The plaintiff can, of course, sue either one; but which one of the defendants is liable to to the other for the damages which the plaintiff would be entitled to recover for the injury which he has sustained on account of their negligence? We think that Ponton would be liable to the town, and that any recovery which might be made against the town could be ultimately recovered back from Ponton. Robbins *v.* City of Chicago, 71 U. S. 657, 18 L. Ed. 427. And, again, the plaintiff and the defendant had a legal right to make the contract which they entered into, and, the consideration having been paid by Ponton, he must be protected in his rights under that contract. He cannot be protected in those rights if the town is by law permitted to recover out of him whatever damages the town might be compelled to pay to the plaintiff. And the town, as we have seen, can bring such an action against Ponton, and recover from him the amount which it by process of law had been made to pay on account of his negligence. Such a result would be the complete destruction of Ponton's rights under his contract with the plaintiff. His honor should have instructed the jury that upon the evidence the plaintiff could not recover. New trial.

Personal Injury—Unguarded Pit in Sidewalk—Whether Town and Individual Joint Tort Feasors.

Same—Same—Ultimate Liability.

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NOTES.

**Defective Streets and Sidewalks—Injuries—Right of Recourse by Municipality against Lot-Owner Where Former Is Held Liable.**—Whenever the owner of premises abutting upon a street or highway

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makes excavations therein, places obstructions thereon, or in any other way renders the street hazardous for passers-by, and the municipality is mulcted in damages for injuries caused by such a fault of the abutting lot-owner, it may recover over from the lot-owner; as they are not joint tort feasors.

*United States.*—Chicago *v.* Robbins, 2 Black (U. S.), 418, 4 Wall. 657.

*District of Columbia.*—District of Columbia *v.* Baltimore & Potomac R. Co. (D. C.), 4 Am. & Eng. R. Cas. 179, 1 Mackey 314.

*Connecticut.*—Norwich *v.* Breed, 30 Conn. 355.

*Illinois.*—Gridley *v.* Bloomington, 68 Ill. 47; Severin *v.* Eddy, 52 Ill. 189; Rockford *v.* Hilderbrand, 51 Ill. 155.

*Indiana.*—Catterlin *v.* Frankfort, 79 Ind. 547, 41 Am. Rep. 627; Elkhart *v.* Wickwire, 87 Ind. 77; McNaughton *v.* Elkhart, 85 Ind. 384.

*Iowa.*—Ottumwa *v.* Parks, 43 Iowa 119.

*Maine.*—Portland *v.* Richardson, 54 Me. 46; State *v.* Gorham, 37 Me. 451; Veazie *v.* Penobscot R. Co., 49 Me. 119; Phillips *v.* Veazie, 40 Me. 96; Wellcome *v.* Leeds, 51 Me. 313.

*Massachusetts.*—Currier *v.* Lowell, 16 Pick. 170; Lowell *v.* Short, 4 Cush. 275; City of Lowell *v.* Spaulding (Mass.), 50 Am. Dec. 775; Boston *v.* Worthington, 10 Gray 496; Woburn *v.* Boston & L. R. R. Corp. 109 Mass. 285; Woods *v.* Groton, 111 Mass. 357; West Boylston *v.* Mason, 102 Mass. 341; Westfield *v.* Mayor, 122 Mass. 100; Roxbury *v.* Boston & P. R. R. Corp., 6 Cush. (Mass.) 430.

*Minnesota.*—Campbell *v.* Stillwater, 32 Minn. 308.

*New York.*—People *v.* Brooklyn, 65 N. Y. 349; Rochester *v.* Montgomery, 72 N. Y. 65; First Nat. Bank *v.* Village of Port Jervis, 96 N. Y. 550, 6 Am. & Eng. Corp. Cas. 233; Brooklyn *v.* B. City R. R. Co., 47 N. Y. 475.

*New Hampshire.*—Winship *v.* Enfield, 42 N. H. 197; Littleton *v.* Richardson, 34 N. H. 179, 66 Am. Dec. 759; Sides *v.* Portsmouth, 59 N. H. 24.

*Ohio.*—Steubenville *v.* McGill, 41 Ohio St. 235.

*Pennsylvania.*—Aston *v.* McClure, 102 Pa. St. 322; Brookville *v.* Arthurs, 130 Pa. St. 501, 31 Am. & Eng. Corp. Cas. 143.

*Vermont.*—Willard *v.* Newbury, 22 Vt. 458; Barber *v.* Essex, 27 Vt. 62. See also 1 Mun. Corp. Cas. 383, *note.*

But see City of Kansas City *v.* File (Kan.), 1 Mun. Corp. Cas. 377, where it is held that when an electric light wire in a city breaks and falls down and remains in the street for three weeks, constituting thereby a dangerous obstruction to travel, and causing injury to a passer-by, both the city and the electric light company are presumed from the lapse of time to have knowledge of its condition and dan-

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gerous character, and both may be joined in an action for damages for injuries resulting from their negligent omission to cause the wire to be repaired.

**Where Property-Owner Assumed Duty of Repairing Sidewalk.**—A property-owner who has assumed the obligation of keeping the sidewalk in front of his premises in proper condition is liable over to a borough for any amount which it has been compelled to pay to one injured, owing to a defect in such walk, existing through the negligence of such property-owner. The liability over the property-owner to the borough in such case is not affected by the principle that one of two joint wrongdoers cannot have contribution from the other, the borough and the property-owner being in no sense joint wrongdoers. Brookville *v.* Arthurs (Pa.), 31 Am. & Eng. Corp. Cas. 143.

**Obligation to Repair Imposed upon Lot-Owner.**—Under the city charter of Detroit, which authorizies the common council to provide by ordinance that, whenever any sidewalk requires to be built or repaired, the owner, agent, or occupant of the adjacent lot shall be notified to build or repair the same, and declares that, if the neglect to do so for a time to be specified in such ordinance, it shall be the duty of the board of public works to build or repair the same, the expense thereof to be assessed upon such lot, the duty of the lot-owner to repair the sidewalk in front of it, when required to do so by ordinance and notice, does not cease upon expiration of the time specified in the ordinance; and when both he and the board of public works neglect to repair, and the city has to pay damages for injury caused by the sidewalk's defective condition after such time had expired, the lot-owner is liable to the city therefor. City of Detroit *v.* Chaffee (Mich.), 37 N. W. Rep. 882.

But a lot-owner has been held not liable to a municipality for damages to passers-by resulting from the defective condition of the sidewalk in respect in which he had failed or refused to make repairs. Kirby *v.* Boylston Market Ass'n., 14 Gray 249; Keokuk *v.* Keokuk, 5 N. W. Rep. 503; Heeny *v.* Sprague, 11 R. I. 456; Jansen *v.* Hatchison, 16 Kans. 358; Eustace *v.* Johns, 38 Cal. 3; Flyn *v.* Canton Co., 40 Md. 312.

And it has been held that the owners of lots abutting upon a city street do not incur any liability to individuals or the municipality for damages arising from a defective sidewalk in front of such lots, where the charter of the municipality does not assume to make the lot-owner liable to the party injured. Accordingly, where a city charter makes it the duty of every lot-owner to keep the sidewalks adjoining his lot in good repair and empowers the superintendent of streets, after notice of the lot owner's neglect, to make repairs himself and collect the expense from the owner, the city cannot, in the

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absence of any negligence or breach of contract duty on the part of the lot-owner, recover from him the amount of a judgment recovered against it for damages sustained by one who received injury owing to a defect in the sidewalk adjoining such owner's lot. Rochester *v.* Campbell (N. Y.), 35 Am. & Eng. Corp. Cas. 576.

**Failure of Property-Owner to Clear Snow and Ice from Sidewalk.**—A city is not entitled to recover of the owner of property fronting on a street damages paid by it to one who received injuries by reason of the property-owner's failure to keep his sidewalk free from snow and ice, although a city ordinance imposes that duty upon property-owners, and prescribes a penalty for its violation. St. Louis *v.* Connecticut Mut. L. Ins. Co. (Mo.), 35 Am. & Eng. Corp. Cas. 573.

**Owner of Premises and City Jointly and Severally Liable for Defect in Sidewalk.**—Where a duty rests upon both a city and the owner of premises within the city to keep the sidewalk in repair fronting the premises, and over an excavation, a failure to do so is a common neglect of duty, and both will be liable, either jointly or severally, to one injured in consequence of such neglect, who has himself exercised due care. City of Peoria *v.* Simpson, 110 Ill. 294.

**Effect of Judgment against City.**—A judgment against a city for injuries from an excavation made by a private party is conclusive against such party, who had notice of such suit, as to the right of the injured party to recover, and as to the amount which may be recovered against him, in an action by the city; and he cannot relieve himself of liability by showing he was under no obligation to keep that portion of the street in repair, or that the injury resulted through no fault of his, or that it resulted from the negligence of the city as well as his. Faith *v.* Atlanta (Ga.), 18 Am. & Eng. Corp. Cas. 350.

And it is said that where the property owner has notice of the pendency of the suit against the municipality and could have defended therein, but fails to do so, he is concluded as to the existence of the defect, the liability of the municipality and the measure of the damages for the injury sustained. Veazie *v.* Railroad Co., 49 Me. 119; Mayor *v.* Troy, etc., Railroad Co., 49 N. Y. 657; Brooklyn *v.* City Railroad Co., 47 N. Y. 475; Milford *v.* Holbrook, 9 Allen 17; Boston *v.* Worthington, 10 Gray 496; Westfield *v.* Mayor, 122 Mass. 100. But see Chicago *v.* Robbins, 4 Wall. 657; Littleton *v.* Richardson, 54 Me. 46.

**Primary Liability of Property-Owner.**—Where city charter provides that the owners of lots shall be primarily liable for injuries from defective sidewalks in front of their lots, and on the return of an execution, issued on a judgment against a lot-owner, unsatisfied,

the injured party may bring an action against the city, an action cannot be maintained against the city where the plaintiff admits that he has never obtained such a judgment against the lot owner. Henker *v.* City of Fond Du Lac. (Wis.), 20 Am. & Eng. Corp. Cas. 333.

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PEAKE

*v.*

CITY OF SUPERIOR.

(*Supreme Court of Wisconsin, April 6, 1900.*)

**Personal Injury—Defect in Street—Special Verdicts.**—Where plaintiff was entitled to have the jury find, in a special verdict, whether there was a defect in the street; and whether, if so, there had been negligence in not discovering and repairing it, it was error to submit to the jury only one question, to be answered "yes" or "no" covering both issues.

**Same—Same—Same—Liability of City.***—If a street is not reasonably safe, and the city has constructive notice thereof and time to repair, it is liable to one injured thereby while exercising ordinary care; and the jury should be left to determine, from all the evidence, as to its condition; and they should not be restricted to the inquiry whether the defect was of such a nature that men of ordinary care and prudence would have anticipated injury from it to ordinarily careful pedestrians.

**Streets—Care Required of Municipality—Distinction between Defects in Construction and Subsequent Defects.**—The duty of a city to make a street reasonably safe in its original construction is absolute; but the duty to discover and repair subsequent defects, not caused by acts of city, is one involving only ordinary and reasonable care and diligence.

APPEAL by plaintiff from Douglas county circuit court. *Reversed.*

This is an action for personal injuries resulting to the plaintiff from a fall upon a street in the city of Superior, August

*See *note*, 1 Mun. Corp. Cas. 58.

2, 1898. The evidence showed that the plaintiff was a cripple, and was accustomed to ride about the streets of Superior, going to and from his business, in a tricycle. On the day of the accident he was riding upon one of the streets of the city, and endeavored to cross from the pavement of the street to the sidewalk on the corner of Ogden avenue and Eleventh street. At this point there is a gutter between the pavement of the street and the curbstone of the sidewalk, the depth of which does not appear with certainty; but it was 11 inches in width, and was bridged by 2-inch planks, 8 feet in length, running parallel with the curb, and arranged so as to be removed for the purpose of cleaning the gutter beneath. The edge of the plank towards the sidewalk was on a level with the curb, and it was intended to be supported upon that level by means of three iron straps which were spiked on the under side of the plank, and extended up on the curb side thereof, with a flange at the top, so as to rest on the curb. It appears that, while the plaintiff's tricycle was going over this plank, it was in some manner upset, and the plaintiff was thrown into the gutter, receiving serious injuries. The plaintiff's evidence tended to show that the plank was at the time loose at one end, either on account of a defective strap and flange, or because of the absence of the flange entirely, so that this end of the plank dropped when the wheel of the tricycle passed over it, thus upsetting the same and causing the injuries complained of. There was also evidence on the part of the plaintiff tending to show that the plank had been in this condition for some weeks. On the part of the defendant there was evidence to the effect that the plank was properly fixed in place at the time of the accident, and that there had in fact been no defect in the same. The following questions were submitted to the jury, as a special verdict: "(1) Was the defendant guilty of any want of ordinary care in respect to the maintenance of the street in question in a proper state of repair? (2) If your answer to question No. 1 is 'Yes,' then was such want of ordinary care the approximate cause of the injuries com-

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plained of? (3) Was the plaintiff guilty of any want of ordinary care that contributed to produce the injuries complained of? (4) What sum of money will compensate plaintiff for the damages he has sustained by reason of the injuries complained of? (5) If your answer to the first question is 'Yes,' then in what respect was this street defective at the time and place of this accident? (6) How long did such defects exist at the time of the accident?" As to the first of these questions the circuit judge charged the jury, among other things: "Was the defendant guilty of any want of ordinary care in respect to the maintenance of the street in question in a proper state of repair? *In determining this question, you will consider, first, whether or not the street, at the place and time of the accident, was in a reasonably safe condition for people to travel on in the usual manner of traveling. If you find that it was, then you will answer this first question,* 'No.' If, however, you find that there was a defect in the street at the time and place of the accident, then you will consider and determine whether or not such a defect had existed for such a length of time as to give the defendant constructive notice of its existence, and a reasonable time for its repair after it had such notice; *and if you find that there was a defect in the street at the time and place of the accident, and that such defect had existed for a sufficient length of time prior to the accident to give the defendant constructive notice of it, and a reasonable time within which to repair it after such notice, then you will consider and determine whether or not the defect was of such a nature that a man of ordinary care and prudence would reasonably expect might result in an injury to persons using the place with ordinary care for travel in the usual and ordinary manner of traveling.* Hence, if you find from the evidence that at the time and place of the accident the street was not in a reasonably safe condition for travel in the ordinary and usual mode of travel; that such unsafe condition had existed for a sufficient length of time to give the defendant constructive notice of its existence, and a reasonable time for

the defendant to repair it after such notice, and before the accident; and that such unsafe condition was of such a nature that a man of ordinary care and prudence would reasonably expect might result in an injury to persons using the place with ordinary care for travel in the usual and ordinary modes for traveling,—then you will answer this question in the affirmative; otherwise, you will answer it in the negative." The plaintiff excepted to the submission of the first question, and also excepted to those clauses of the instructions printed in italics. The jury answered the first question "No," and left the others unanswered. This verdict was received by the court, and judgment for the defendant rendered thereon, and from that judgment the plaintiff appeals.

*W. P. Crawford*, for appellant.
*T. L. McIntosh*, for respondent.

WINSLOW, J. (after stating the facts). It is entirely plain that the first question of the special verdict covers two controverted issues in the case, *viz.*: (1) Whether there was a defect in the street; and (2) whether it had existed so long that the city officials should have known and repaired it. The question was answered in the negative, but no one can say whether this answer means that there was no defect, or that there was a defect, but that it was so recent that the city was not chargeable with notice thereof. This, however, is not the most serious vice in the question. Some of the jury may have been satisfied that there was no defect, and others that there was a defect, but that it was so recent as not to charge the city with notice; and, while all would thus agree that the question should be answered in the negative, there would be no agreement upon the facts. This is just the difficulty which the special verdict is intended to obviate "Special verdicts are worse than useless if courts do not submit for them single, direct, and plain questions, and insist upon positive, direct, and intelligible answers." Carroll *v.* Bohan, 43 Wis. 218. The plaintiff was entitled to have the jury

Personal Injury—Defect in Street—Special Verdicts.

say, in answer to simple and direct questions, (1) whether there was a defect; and (2) whether, if so, there had been negligence in not discovering and repairing it. To combine the two questions in one, so that a negative answer would inform no one what the conclusions of the jury were upon them separately, or, in fact, whether any unanimous conclusion at all was reached upon the separate questions, was, we think, prejudicial error, under the circumstances of this case. In submitting this question the court recognized its dual character, and charged the jury first to consider and determine whether or not the street was reasonably safe (*i. e.* whether there was a defect), and, if they found there was a defect, then to determine whether it had existed so long as to give defendant constructive notice of its existence, and time to repair it. So far the charge seems unexceptionable. But the court then proceeded to say, in substance, that, if they found both defect and constructive notice, they must go further, and determine whether "the defect was of such a nature that a man of ordinary care and prudence would reasonably expect might result in an injury to persons using the place with ordinary care." This involves confusion in terms, to say the least. A "defect" in the street is a lack of reasonable safety. If the street is not reasonably safe, and the city has constuctive notice thereof and time to repair, then the city's negligence is established, and its liability to respond to one injured thereby while exercising ordinary care is certain. But the court, in effect, said that if there was a defect (*i. e.* lack of reasonable safety), and constructive notice thereof, and time to repair, still this was not sufficient, but that, in order to find defendant guilty of negligence, they must go further and find that the defect was of such a nature that men of ordinary care and prudence would reaonably expect would result in injury to ordinarily careful pedestrians. This test of the character of the street was distinctly repudiated in Draper *v.* City of Ironton, 42 Wis. 696; and it was said that the jury should be left to determine, from all the evidence as

Same—Same—Same—Liability of City.

to its condition, whether the highway was or was not in a reasonably safe condition for travel, and should not have been restricted to the inquiry as to what a certain class of persons might think as to the probability of accidents happening to ordinarily careful travelers. Whatever might be said about the reasonableness of this test, as an original proposition, we see no occasion now to overrule the Draper Case. Certainly, in the present case, when the court told the jury that after they had found a defect, and found constructive notice, they must still go further, and find an additional fact presumably different from anything they had before found, we think it was misleading and prejudicial.

**Streets—Care Required of Municipality—Distinction between Defects in Construction and Subsequent Defects.**

There was considerable discussion in the briefs in this case as to the question whether the city is under an absolute duty to make and keep the streets in a reasonably safe condition, or is only bound to the exercise of reasonable and ordinary care. It seems to have been thought by counsel that there had been a change in the position of the court upon this subject since the case of Ward *v.* City of Jefferson, 24 Wis. 342. That case simply held that, where a highway was defectively constructed by the municipality, the statutory duty has never been performed, and the liability of the municipality for injuries resulting from such defect to travelers exercising ordinary care was absolute. Such a defect being established, the negligence of the town is conclusively proven, and the jury cannot find that ordinary care has been exercised. On the other hand, it was said in that case, in substance, that if the highway was originally constructed with reasonable safety, but afterwards became defective by action of the elements or the act of a third person, and a traveler was injured thereby, the question whether the municipal officials had notice of the defect, or had exercised ordinary and reasonable care and diligence in inspecting the highway and repairing the defect, arises, and must be decided. In other words, the duty to make the street reasonably safe in its original construction is absolute; but the duty to discover and

repair defects afterwards occurring, not by acts of the municipality, is one involving only ordinary and reasonable care and diligence. This latter duty may properly be called the duty to exercise ordinary care, if the term "ordinary care" be properly defined. If the question be submitted to the jury in that form, however (namely, in the form of an inquiry whether the municipality had exercised ordinary care in its inspection and repair of streets), it is manifest that some instruction should be given to the jury as to what constitutes ordinary care in such a case; otherwise, the question may well be misleading. Highway officials are bound to exercise reasonable vigilance in the care of the streets under their charge, and it is only that degree of care which reasonably vigilant and careful officials would and do exercise under similar circumstances which can properly be called "ordinary care" in such a case as the present. With this explanation of the subject, it is not believed that there has been any material divergence in the decisions upon the subject in this court. For the reasons given, there must be a new trial. Judgment reversed, and action remanded for a new trial.

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## CITY OF CHICAGO

*v.*

## NETCHER.

(*Supreme Court of Illinois, Dec. 5, 1899.*)

**Department Stores—Validity of Ordinance.**—The ordinance of the defendant city prohibiting only those persons engaged in selling dry goods, clothing, jewelry, and drugs from selling in their stores certain kinds of provisions is not a reasonable regulation of the business of selling provisions, but is invalid as an arbitrary prohibition, and an attempted interference with rights guarantied by the constitutions of the United States and the state of Illinois.

**Police Power.**— A statute or ordinance, to be a valid exercise of the police power, must tend, in some degree, towards the prevention

of offenses, or the preservation of the public health, morals, safety or welfare; and if it is manifest that it has no such object, but, under the guise of a police regulation, is an invasion of the property rights of the individual, it is the duty of the court to declare it void.

**Department Stores—Intoxicating Liquors—Validity of Ordinance.**—A city ordinance prohibiting only those persons engaged in selling dry goods, clothing, jewelry, or hardware from selling in their stores intoxicating liquors in sealed bottles or jugs, not to be drunk on the premises, cannot be held valid as a police regulation, and is void as an attempted arbitrary discrimination.

APPEAL by city from Cook county criminal court. *Affirmed.*

*Charles M. Walker* and *Denis E. Sullivan*, for appellant.
*William W. Gurley* and *Horace G. Stone*, for appellee.

CARTWRIGHT, C. J. Two prosecutions were instituted before a justice of the peace by the city of Chicago, appellant, against Charles Netcher, appellee, for the violation of two ordinances of said city. In each case he was found guilty, and fined $25 and costs by the justice. On appeal to the criminal court of Cook county the cases were tried upon agreed statements of fact before the court without a jury. In each case the court held the ordinance upon which the prosecution was based to be void, in propositions of law submitted for that purpose, and found the defendant not guilty. The city prosecuted appeals from these judgments to this court. The cases, being of the same nature, and largely involving the same questions of law, have been argued together, and will be considered and disposed of in this opinion.

Case Stated.

The defendant is the owner of what is known as a "department store," or general store for the sale of different kinds of merchandise, divided into separate departments, in the city of Chicago. The ordinances are directed against stores of that class, and the object of each is to prohibit the sale of certain kinds of merchandise in any store or place of business where certain other kinds of merchandise are sold. One of these ordinances provides as follows: "It shall be unlawful for any person, firm, or corporation doing business

in this city, where dry goods, clothing, jewelry, and drugs are sold, to have exposed for sale, or sell to any person, firm, or corporation, any meats, fish, butter, cheese, lard, vegetables, or any other provisions." The facts agreed upon at the trial for the violation of this ordinance were that the defendant owned, conducted, and operated the store in question, and in the basement and on certain floors exposed for sale and sold dry goods, clothing, jewelry, and drugs, and on a different floor, where no such articles were sold or exposed for sale, he exposed for sale and sold meats, fish, butter, cheese, lard, vegetables, and other provisions. The city of Chicago is organized under the general incorporation law, and must find in its charter authority for the exercise of every power which it claims to possess. The authority to pass this ordinance is claimed by virtue of clause 50, § 1, art. 5, of said act, which enumerates among the powers of the city council the following: "To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same." Hurd's Rev. St. 1895, p. 267. Regulations concerning the sale of provisions have relation to the public health, and may be necessary or proper for its preservation and the suppression of disease. Kinsley *v.* City of Chicago, 124 Ill. 359, 16 N. E. 260. The clause of the incorporation act relied upon confers upon cities organized under the act the right to regulate the sale of provisions, with the object of promoting or preserving the public health, where the regulation tends to serve that purpose. But this ordinance does not regulate the business of selling provisions, nor prescribe the manner in which the business shall be carried on. It merely prohibits persons engaged in the business of selling dry goods, clothing, jewelry, and drugs from selling in their stores the provisions enumerated in the ordinance. It permits a person to sell in any place or manner, provided, only, that he does not at the same time sell certain other things. A dealer may sell provisions at the same place

Department Stores—Validity of Ordinance.

with hardware, furniture, boots and shoes, hats and caps, millinery, books and stationery, crockery and glassware, carpets, confectionery, wooden ware, wallpaper, or any other sort of merchandise except dry goods, clothing, jewelry, and drugs. This is not a regulation, but a prohibition, and a purely arbitrary one, which attempts to deprive certain persons of exercising a right which has always been lawful, and has been heretofore exercised throughout the state and country without question. The ordinance is also an attempted interference by the city with rights guarantied to the defendant by the constitutions of the United States and of this state. The questions involved are not new. They have been before this and other courts throughout this country in numerous cases, and the rights of the citizen, as against such interference, have been frequently defined and uniformly upheld. These constitutions insure to every person liberty, and the protection of his property rights, and provide that he shall not be deprived of life, liberty, or property without due process of law. The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it. It is a necessary incident to the ownership of property that the owner shall have a right to sell or barter it, and this right is protected by the constitution as such an incident of ownership. When an owner is deprived of the right to expose for sale and sell his property, he is deprived of property, within the meaning of the constitution, by taking away one of the incidents of ownership. Liberty includes the right to pursue such honest calling or avocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety, and welfare. The state, for the purpose of public protection, may, in the proper exercise of the police power, impose restrictions and regulations; but the right to acquire and dispose of property is subject only to that power. The individual may pursue, without let or hindrance from any one, all such callings or pursuits as are innocent in themselves, and not injurious to the public. These are funda-

mental rights of every person living under this government. The legislature can neither, by an enactment of its own, interfere with such rights, nor authorize a municipal corporation to do so. Frorer *v.* People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; Ramsey *v.* People, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853; Braceville Coal Co. *v.* People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340; Cooley, Const. Lim. 393.

In order to sustain legislative interference with the business of the citizen by virtue of the police power, it is necessary that the act should have some reasonable relation to the subjects included in such power. If it is claimed that the statute or ordinance is referable to the police power, the court must be able to see that it tends, in some degree, towards the prevention of offenses, or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such object, but, under the guise of a police regulation, is an invasion of the property rights of the individual, it is the duty of the court to declare it void. Braceville Coal Co. *v.* People, *supra*; Eden *v.* People, 161 Ill. 296, 43 N. E. 1108; Cooley, Const. Lim. 577. It is not claimed in the argument for the city that the selling of the different kinds of merchandise mentioned in the ordinance in the same building tends in any way to affect the safety, health, morals, comfort, or welfare of the public. No attempt is made to suggest any grounds upon which the ordinance can be justified as an exercise of the police power of the city or the state. It certainly cannot be contended that there is anything in the character of dry goods, clothing, jewelry, and drugs which renders it dangerous to the public, or inimical to the general welfare, that they should be sold in the same building with provisions. General stores have always dealt in all kinds of merchandise, and no one has ever imagined that the comfort, safety, or welfare of the public was in any manner or to any extent injured or preju-

Police Power.

diced by them. Public health and public comfort are in no way affected by selling the different kinds of merchandise enumerated in different departments of the same building, and would not be if the same clerk should sell them; nor would the public welfare or comfort be increased by compelling a customer to buy one kind of merchandise in one store and another in some other store. In Meyers *v.* Baker, 120 Ill. 567, 12 N. E. 79, the act prohibiting the establishment of any tent, booth, or place of vending provisions or refreshments within a certain distance of a camp meeting was sustained as a police regulation tending to prevent disturbance or disorderly conduct. But this ordinance has no such purpose. It is plain that its object is not to protect the health, morals, or safety of the public, or to accomplish any object falling within the police power. It is a mere attempt to deny a property right to a particular class in the community, where all other members of the community are left to enjoy it. It is immaterial whether such a denial is in a statute or in an ordinance passed by virtue of a statute. It is equally invalid in either case.

The other ordinance, under which the second prosecution was begun, provides as follows: "It shall be and is unlawful for any person, firm, or corporation to have exposed for sale or sell any intoxicating, malt, or fermented liquors in any place of business in the city of Chicago where any dry goods, clothing, jewelry, or hardware are kept or exposed for sale." The agreed statement of facts is that the defendant kept in his above-mentioned store dry goods, clothing, jewelry, and hardware, and exposed them for sale in the basement and on certain floors, and on a different floor kept and exposed for sale and sold intoxicating, malt, and fermented liquors; that no liquors of any kind were sold to be drunk on the premises, and none were kept except in sealed bottles or jugs, which were delivered to the purchaser at the store, or delivered by wagons; and that defendant had complied with all the rules and ordinances of the city, and was

Department Stores—Intoxicating Liquors—Validity of Ordinance.

entitled to sell intoxicating, malt, and fermented liquors in said store, except so far as he was disqualified and prevented, if at all, by the said ordinance. The authority of the city to regulate the liquor business is found in clause 46 of said section 1 of article 5 of the incorporation act, as follows: "To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license." Hurd's Rev. St. 1895, p. 267. The liquor business is one peculiarly subject to the police power on account of the multitude of evils which result from it. Police regulation of that business has always been sustained, as having for its object the prevention of intemperance, pauperism, and crime, and diminishing, as far as practicable, the injurious consequences to the public resulting from the business. In Schwuchow *v.* City of Chicago, 68 Ill. 444, it was said: "This business is, on principle, within the police power of the state, and restrictions which may rightfully be imposed upon it might be obnoxious as an illegal restraint of trade when applied to other pursuits." It is clearly within the police power to prohibit all sales of liquor on the ground that "dram drinking is an evil to the person, and pernicious to the welfare of the public." Dennehy *v.* City of Chicago, 120 Ill. 627, 12 N. E. 227. The city may also form prohibition districts for the protection of particular neighborhoods from the influence of dram shops, wherever it is desirable or reasonable that there should be such prohibition, although the sale may be licensed in other parts of the city. People *v.* Cregier, 138 Ill. 401, 28 N. E. 812. This ordinance, however, is not an exercise of the police power for the protection of the public from the injurious effects of the liquor business. It is not aimed at the suppression of the business, either in certain localities or upon any ground of police regulation, but is directed solely against the sale by certain persons in their places of business; that is, by those who also sell dry goods, clothing, jewelry, or hardware. The city of Chicago has not

seen fit to prohibit the sale of liquor, either generally or in the district of the city where defendant's store is kept. It has established its policy with reference to that business, and defendant has complied with its ordinances, so as to be entitled to sell liquor in his store, unless this ordinance constitutes a valid prohibition against his doing so. It is apparent that, if there is any evil in permitting a sealed bottle of liquor to be sold from a store where dry goods, clothing, jewelry, or hardware are sold, the same evils would result from the sale from any other kind of a store. The ordinance permits the dealer in all kinds of merchandise, except dry goods, clothing, jewelry, and hardware, to sell liquor from his store, and the city cannot arbitrarily discriminate against the defendant without any basis or ground for the discrimination. Special privileges are not to be granted to favored persons in the liquor business any more than in any other business. Zanone *v.* Mound City, 103 Ill. 552. There are other clerks employed in the other departments of defendant's store, separate and independent from this, but there is no liquor drunk on the premises, and none sold there for that purpose; so that the ordinance could not have been intended to prevent making a drinking place where clerks are employed in other lines of business. The restriction is purely arbitrary, not having any connection with, and not tending in any way towards the protection of, the public against the evils arising from the sale of intoxicating liquor. That was not the object of the ordinance, and the attempted discrimination is illegal, and in violation of the defendant's rights. The criminal court was right in holding both ordinances void, and the judgments are affirmed. Judgments affirmed.

PRICHARD *et al.*

*v.*

COMMISSIONERS OF MORGANTON *et al.*

(*Supreme Court of North Carolina, June 14, 1900.*)

**Sanitary Measures—Burning Dwelling House—Municipal Powers.***—Neither the charter of the defendant town nor any statute of North Carolina empowered the town commissioners to burn a residence house as a sanitary measure.

**Counties as Municipal Corporations—Liability for Damages.**—Counties are not, in a strictly legal sense, municipal corporations, and are not liable for damages, in the absence of statutory provisions giving a right of action against them.

**Sanitary Measures—Burning Dwelling House—Liability of Town.**†—The defendant town could not be held liable for the act of the town commissioners in burning a residence house as a sanitary measure, as the act was for the interest of the state at large, and because they unreasonably exceeded the powers conferred on them by the town charter for the prevention of the spread of diseases.

**Pleading—Demurrers.**—Where the complaint embraces more than one cause of action, all growing out of the same matter, some of them demurrable and some not demurrable, demurrers directed against the whole complaint will be overruled as to the good causes of action.

APPEAL by plaintiffs from Burke county superior court. *Modified and affirmed.*

*S. J. Ervin* and *Avery & Ervin*, for appellants.

*J. T. Perkins*, for appellees.

MONTGOMERY, J. The plaintiff Nancy Prichard, a tenant in dower, brought this action against the commissioners of

*See Bristol D. & L. Co. *v.* City of Bristol (Va.), 2 Mun. Corp. Cas. 548, and *note*, p. 554.

†See *notes*, 3 Mun. Corp. Cas. 182.

the town of Morganton, the board of commissioners of Burke county, and R. T. Claywell and Robert Ross, as their agents and servants, to recover of them damages for burning the house in which she lived, and certain personal property therein, as a nuisance, because of alleged smallpox taint and infection, for injury and damage to growing crops on the same, and for unlawfully and wrongfully depriving her of her liberty by seizing and carrying her to a pest house for smallpox patients, and keeping her there for weeks, in restraint of her freedom and contrary to her will. The persons entitled to the remainder interest in the real estate are the other plaintiffs in this action. The commissioners of Morganton, for one cause of demurrer to the complaint, say that the complaint fails to allege that the tortious acts complained of were within the scope of the powers conferred on said corporation by its charter, and that it appears on the face of the complaint that the acts complained of are not within the scope of the powers of the corporation, and, for another ground of demurrer, say that, if the acts complained of had been done under the express direction of the town commissioners, the conduct of the commissioners would have been *ultra vires*. The board of commissioners of the county demurred to the complaint, and, among the grounds assigned, these two seem to be the chief: (1) "That the acts alleged to have been done by these defendants, and constituting the plaintiff's cause of action against these defendants, are not within the scope of the corporate powers and duties conferred upon or delegated to these defendants by law; (2) that said acts are not alleged to have been done or performed under or in pursuance of any order, resolution, or direction of these defendants, and these defendants are in no way liable." The defendant Claywell demurred because the complaint alleged that he was merely acting as the agent of the other defendants, and that there was imputed to him, as an individual, no unlawful or wrongful act.

Case Stated.

We have examined the charter of the town of Morganton

(Priv. Laws 1885, c. 120), and find no authority given to the town commissioners to burn or destroy any house or residence. In section 37 the town commissioners are authorized to take such measures as they may deem effectual to prevent the entrance into the town, or the spread therein, of any contagious or infectious diseases; and under those powers they are permitted to cause to be destroyed or disinfected such furniture or other articles as shall be believed to be tainted or infected with any contagious or infectious diseases, or which there shall be reasonable cause to apprehend will generate or propagate diseases, and may take all other reasonable steps to preserve the public health, and for this purpose may use any money in the treasury. That statute certainly does not even purport to give to the town commissioners the right to burn a house in which a family infected, or thought to be infected, with a contagious disease, resides. The right of the commissioners to destroy the property, indeed, is not admitted by the plaintiffs, but it is intimated that they acted under the authority of the act of 1893, c. 214, § 22; but upon examination of that section it appears that reference is there made to the powers and duties of the superintendents of health of the several counties. No powers or rights are there given to the town commissioners or to the board of commissioners of the county. It is there provided that, in cases where the county superintendent of health declares that a nuisance exists on premises, it shall be removed or abated at the expense of the town, city, or county in which the offender lives, in case of his inability to remove it, with the proviso that the expense chargeable to the town, city, or county shall not exceed $100. In reference to the powers conferred by law upon boards of county commissioners, we find that, by subsection 22 of section 707 of the Code, they can establish public hospitals for their several counties in cases of necessity, and make rules, regulations, and by-laws for preventing the spread of contagious and infectious diseases, and for taking care of those afflicted thereby; the

Sanitary Measures—Burning Dwelling House—Municipal Powers.

same not being inconsistent with the laws of the state. no reasonable construction of that subsection of the C can it be held that the boards of county commissioners burn a residence house to prevent the spread of contagi and infectious diseases. A proper disinfection would be extent of their powers in respect to property thus tainted infected. It is not alleged in the complaint that the s complained of were ordered by the county superintendent health; nor does the cause of action, as stated in the co plaint, proceed upon the idea that the property was destro by the defendants under a method allowed by law, and t the plaintiff is entitled to compensation for its loss. T action is one purely in tort.

It is well settled in this state that counties (that is, boards of county commissioners in their corporate capaci are not ordinarily liable to actions of a civil nature for manner in which they exercise or fail to ex cise their corporate powers. They may sued only in such cases and for such causes may be provided for and allowed by the stat

Counties as Municipal Corporations—Liability for Damages.

Counties are not, in a strictly legal sense, municipal cor rations, like cities and towns. They are, rather, inst mentalities of government, and are given corporate pow to execute their purposes; and they are not liable for da ages, in the absence of statutory provisions giving a righ action against them. White *v.* Commissioners, 90 N. 439; Manuel *v* Commissioners, 98 N. C. 9, 3 S. E. 8

There is, however, a distinction between the liability o county for failure to discharge corporate duties, and that a town or city for such a failure. Towns and cities are, a general rule, liable in damages for the negligence of th officers and agents when specific duties are imposed by th charters and special statutes, when the damages are cau by their failure to discharge such duties and to exercise powers conferred to that end, or when the town authori are acting within the scope of their authority in the mana ment of their property for their own interest, or in the ex

cise of powers voluntarily assumed for their own advantage; and that, notwithstanding the work they are engaged in will inure to the benefit of the municipality. But it is said in Moffitt *v.* City of Asheville, 103 N. C. 237, 9 S. E. 695, "Where a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute expressly or by necessary implication subjects the corporation to pecuniary responsibility for such negligence." But the plaintiff does not complain of a negligent act of either of the defendants. The alleged cause of action is a positive act in tort,—the burning of a residence house as a sanitary measure. The board of commissioners of the county, as representing officially the county, are not liable to the demand of the plaintiff, for the reason that there is no statute in existence which makes them so, either expressly or by necessary implication. The town commissioners, as representing the town community, are not liable, for the reasons: First, that the act complained of was for the interest of the state at large; and, second, because they unreasonably exceeded the powers conferred on them by the charter of Morganton, or by any special statute in aid thereof. The case is before us on demurrer, and, of course, the facts concerning the burning are to be taken as true for the purposes of the demurrer. If, however, it be a fact that the house in which the plaintiff lived was burnt as alleged in the complaint, it was a most high-handed and unreasonable act on the part of those who did it, and was done without the semblance of authority. But she is not without redress. Her remedy will doubtless suggest itself to her counsel. The propositions of law which we have laid down seem to be admitted in the plaintiff's brief, and a recovery is sought upon the effect of the defendant's demurrer to the complaint. In the

Sanitary Measures—Burning Dwelling House—Liability of Town.

sixth allegation of the complaint it is alleged that the board of town commissioners burnt the house under some statute or provision of law which they claimed authorized them to assess and burn, and pay for the damage an amount not exceeding $100. Only the facts are admitted by the demurrer. Parties to an action cannot by complaint and demurrer enact a law. There is no such statute as the one referred to in the complaint, and the defendants' demurrer cannot have the effect to admit that there is such a statute and law in force.

If the complaint be treated as containing only one cause of action, the demurrers ought to have been sustained; for the demurrers were directed against the whole complaint, though there was only one allegation that was demurrable,—the one which charged that the residence house of the plaintiff was burned. Cowand *v.* Meyers, 99 N. C. 198, 6 S. E. 82. If the complaint be treated as embracing more than one cause of action, as we will treat it,—all growing out of the same matter, and therefore not demurrable on that account,—we think that the demurrers were good against that cause of action which set forth the burning of the plaintiff's house, and damages therefor. The other causes of actions were not demurrable, and the demurrers should have been overruled as to them. There was error in the particular we have pointed out. Modified and affirmed.

Pleading. Demurrers.

FURCHES, J. (dissenting). The plaintiff Nancy Prichard alleges that she is the widow of Z. T. Smith, deceased, and that the other plaintiffs are the children and heirs at law of said Smith; that as such widow she was entitled to dower upon the lands of her said husband, which was laid off and assigned to her in a house and lot in the town of Morganton, in which she and her family were living; that there were other buildings on said lot, and a growing crop of corn, and a garden with vegetables growing therein; that, besides these, she owned and had in said house clothing, bedclothing, tableware, and other domestic articles and furniture; that on

or about the last of May, 1899, the defendants Robert Ross and R. T. Claywell, under the pretense that the plaintiff had smallpox, or had been exposed to the disease of smallpox, and claiming that they were authorized to do so by an order of the board of commissioners of Morganton, sustained and approved by the board of commissioners of Burke county, came to her house, arrested her, and carried her to a pest house, set fire to and destroyed her house and the other outhouses on the lot, and also burned and destroyed her clothing, bedclothing, tableware, and household furniture, when in fact she did not have smallpox, nor does she believe that she had been exposed to that contagious disease. To recover damages for this treatment,—the loss of houses, and the loss and destruction of her personal property,—she brings this action against the defendants, Robert Ross, R. T. Claywell, the board of commissioners of Morganton, and the board of commissioners of Burke county. To this complaint the defendants demurred, thereby admitting the facts stated in the complaint to be true; and, taking these facts to be true, as we must do, it would seem that the plaintiff is entitled to damages from somebody. One ground of the demurrer is the misjoinder of causes of action—too many causes joined together in one action. But it appears that they all grew out of one wrongful act, or are connected with the same, and that the complaint is not demurrable on that account. Benton *v.* Collins, 118 N. C. 196, 24 S. E. 122; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478. It is claimed in the demurrer that Ross and Claywell are not liable because they were only the agents and servants of the other defendants. Admitting that this defense can be raised by the demurrer in this case (which we do not admit), it could not protect them, unless their employers had the right to commit this trespass upon the plaintiffs, and to destroy their property. And, while this is so,—must be so,—the other defendants claim that they had no right to order this trespass and destruction of property, and demand protection on that account. So it is manifest that both of these contentions

cannot be true, nor can both these defenses be good. This is sufficient to justify the court in overruling the demurrer. But are the other defendants liable? The complaint alleges that this trespass and destruction of plaintiff's property were done by order of the board of commissioners of Morganton, sanctioned by the commissioners of Burke county. But it is contended that they had no right to make such order; that it was *ultra vires*, and they are not bound by it. But it is provided in section 37, c. 120, Priv. Laws 1885 (Charter of the Town of Morganton), "that the board of commissioners may take such means as they may deem effectual to prevent the entrance into the town or the spreading therein of any contagious or infectious diseases, * * * may cause any person in the town believed to be infected with such contagious disease or whose stay may endanger the public health, to be removed to some place within or without the town limits, may cause to be disinfected or destroyed such furniture or other articles which shall be believed to be tainted or infected with any contagious or infectious disease, or of which there shall be reasonable cause to apprehend will generate or propagate diseases, and may take all other reasonable steps to preserve the public health, and for this purpose may use any money in the treasury." It would be very hard to believe that the draftsman of this act did not think he was giving the commissioners of Morganton plenary power to deal with contagious diseases; and it seems that they so understood it when they made this order, as it appears from the complaint that they have had the plaintiff's damages assessed at $100, and have offered to pay plaintiff that amount. But it is contended that the commissioners were limited to that amount. This cannot be so,—that the act authorized the commissioners to destroy property, and limited the plaintiff's damages to $100, or any other amount less than the value of the property destroyed. If this contention of defendants were true, it would allow the defendants to assess their own damage. This cannot be so. It is further contended that this act does not extend to the

destruction of houses. I do not agree to this contention. If that were true, what becomes of damage for her clothing, the bedclothing, tableware, and other articles of household furniture destroyed? Has the plaintiff no remedy for this trespass and destruction of property? I cannot so hold. As there was no statute called to our attention that authorized the county commissioners to destroy property in Morganton, it is probable that they are not liable. The demurrer should have been sustained as to them, but was properly overruled as to the others. This was written as a tentative opinion, and, although the opinion of the court has been modified since it was written, it is filed as a dissenting opinion.

FAIRCLOTH, C. J. I concur in the dissenting opinion.

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## GRAY

*v.*

## MAYOR, ETC., OF GRIFFIN.

(*Supreme Court of Georgia, July 13, 1900.*)

**Injury to Prisoner—Negligent Maintenance of Prison—Liability of Municipality.***—In erecting and maintaining a city prison a municipal corporation is exercising a purely governmental function, and is, therefore, not liable in damages to a person arrested and imprisoned therein by its police officers, for injuries sustained by him, while so confined, by reason of the improper construction or negligent maintenance of such prison.

**Illegal Arrest by Policeman—Liability of Municipality.**†—A municipal corporation is not liable for the illegal arrest of a person by its police officers, nor for his consequent imprisonment.

**Liability for Acts of Mayor—Excessive Appearance Bond.**—Nor is a city liable in damages because its mayor required of a person charged with a violation of a city ordinance a larger bond for his

*See notes at end of case.

†See Craig *v.* Charleston (Ill.), 2 Mun. Corp. Cas. 139, and *note*, p. 141.

appearance than the law authorized, even if the failure of such person to give bond and his consequent confinement were occasioned thereby.

(Syllabus by the Court.)

ERROR by plaintiff from Spalding county superior court. *Affirmed.*

*Jas. Flynt* and *Lloyd Cleveland*, for plaintiff in error.

*Wm. H. Beck* and *O. H. P. Slaton*, for defendant in error.

FISH, J. Taking the allegations of the plaintiff's petition to be true, as we must do upon demurrer, he certainly has just and great cause to complain of the needless hardships and suffering which he endured while confined in the city guard house. But, however strongly the story of his sufferings may appeal to our sentiments of humanity, the law affords him no redress against the municipality. The general rule is well established that a municipal corporation is not liable in damages for injuries sustained by reason of the negligent or improper exercise of a purely governmental power. The preservation of the public peace, quiet, good order, etc., of a community, is a governmental function. Were the legislative authority of a city passes ordinances for such purposes, it is clearly exercising a governmental power. When, for the purpose of enforcing such ordinances, the city erects and maintains a prison wherein to confine offenders, for the purpose of punishment, or those charged with offenses, for safe-keeping until they can be tried, it is exercising the same power. The enactment of such ordinances, and the provision made for their enforcement, belong to the police power, which is purely governmental in character. In Love *v.* City of Atlanta, 95 Ga. 129, 22 S. E. 29, this court held that as "the duty of keeping the streets clear of putrid and other substances offensive to the sense of smell, and which tend to imperil the public health, devolves, under the charter of the city of Atlanta, upon the board of health of that city, and the functions of this department of the city government being governmental, and not purely administrative, in their

Case Stated.

character, it follows that if, in the exercise of such functions, and in the discharge of the duties devolving upon this department thereunder, a private citizen is injured by the negligence of one of its servants in and about such work, no right of action arises against the city." In the opinion, MR. JUSTICE ATKINSON said: "The principle of nonliability rests upon the broad ground that, in the discharge of its purely governmental functions, a corporate body to which has been delegated a portion of the sovereign power is not liable for torts committed in the discharge of such duties, and in the exercise of such powers." In Bartlett *v.* City of Columbus, 101 Ga. 300, 28 S. E. 599, it was held that "a municipal corporation is not liable, in an action for false imprisonment, for damages alleged to have been occasioned to the plaintiff by reason of his imprisonment under a judgment rendered against him by a municipal court for the violation of an ordinance; and this is true though such judgment may have been irregular, erroneous, or even void." In Nisbet *v.* City of Atlanta, 97 Ga. 650, 25 S. E. 173, it was held that "a municipal corporation is not liable in damages for the death of one convicted in a corporation court and sentenced to work upon the public streets, although his death was occasioned while the convict was engaged in such work, and resulted from negligence on the part of the foreman who had been placed by the municipal authorities in charge thereof, and from the failure of such foreman to provide the convict, after his injury, with proper medical attention and treatment." In the opinion MR. JUSTICE LUMPKIN said: "Neither the law of master and servant, nor the doctrine of *respondeat superior*, applies" in such a case, "because in such matters the municipal corporation is exercising governmental powers and discharging governmental duties, in the course of which it, of necessity, employs the services of the officer in question." In the case of Brown's Adm'r *v.* Town of Guyandotte, 12 S. E. 707, the supreme court of West Virginia held that "a town is not liable for damages for the death of a person caused by the burning of its jail while such person was confined therein for a violation of its ordinances,

though such fire was attributable to the wrongful act or negligence of the officers or agents of the town." BRANNON, J., in the opinion, said, "I think the duty and function of keeping a jail, and confining therein offenders against the municipal ordinances of a town, are plainly purely governmental in character." In La Clef *v.* City of Concordia, 41 Kan. 323, 21 Pac. 272, it was held that, "where a person is confined in a city prison upon conviction for disturbing the peace and quiet of the city, the city is not liable for damages for injuries sustained by reason of the bad character of the prison, or the negligence of the officer in charge of the same." This decision was followed in City of New Kiowa *v.* Craven, 46 Kan. 114, 26 Pac. 426, where an administratix sought to recover from a city damages for the death of her intestate husband, alleged to have been caused by his confinement and exposure in an unhealthy, uninhabitable, and filthy prison. In Gullikson *v.* McDonald, 62 Minn. 278, 64 N. W. 812, it was held that "a municipal corporation is not liable for negligently maintaining its lockup in a defective and unfit condition, by reason of which a prisoner confined therein is injured." In Blake *v.* City of Pontiac, 49 Ill. App. 543, a case in which damages were sought for injuries alleged to have been sustained by reason of the confinement of the plaintiff in an improperly constructed and negligently maintained city prison, it was held that the municipal corporation was not liable, and that "the building of the calaboose, and the establishing of regulations for the detention of prisoners therein to answer to charges of violating the ordinances of the city, are clearly within the police power of municipal corporations, and are not in their nature corporate acts." So, in Kelly *v.* Cook (decided the supreme court of Rhode by Island, Oct., 1898), 41 Atl. 571, it was held that "a demurrer to a declaration was properly sustained where it was alleged that complainant was negligently cared for while temporarily confined in a police station, as such negligence did not render the city liable, since in caring for persons under arrest the city discharged a public duty." The precise question

under consideration was decided in another recent case, in New York, and the court held that "where a person was arrested for violation of a village ordinance, and imprisoned in a place negligently permitted to become and remain so dilapidated that in consequence of the exposure he contracted a disease which caused his death, the village was not liable for the omission of its duty in the exercise of its governmental functions." Eddy *v.* Village of Ellicottville, 35 App. Div. 256, 54 N. Y. Supp. 800.

In support of their contention as to the liability of the municipal corporation for the injuries sustained by the plaintiff while confined in the city guard house, his counsel cite Moffit *v.* City of Asheville, 103 N. C. 237, 9 S. E. 695, and Shields *v.* Town of Durham (N. C.), 21 S. E. 402, in each of which cases the allegations of the respective plaintiffs were of a similar character to those in the present case. In each of those cases, however, the court held that the municipal corporation sued was not liable in damages, as it had complied with the law of North Carolina in the construction of its prison and the furnishing of the necessary supplies, etc., therefor, and the plaintiff's injuries were sustained in consequence of the neglect of the jailer or attendants, of which notice had not been brought to the city before the injuries were received; and the court recognized and upheld the general rule, stated by AVERY, J., in the Asheville Case, that "when a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, unless some statute, expressly or by necessary implication, subjects the corporation to a pecuniary responsibility for such negligence." These cases are doubtless cited because they do recognize the principle which obtains in North Carolina, which, as stated in the same opinion from which we have just quoted, is that towns and cities "are liable in damages only for a failure to so construct their prisons, or to provide them with fuel, bed-

Injury to Prisoner—Negligent Maintenance of Prison—Liability of Municipality.

clothing, heating apparatus, attendants, and other things necessary, as to secure to the prisoners committed to them a reasonable degree of comfort, and protect them from such bodily suffering as would injure their health." But this principle is derived by the supreme court of North Carolina from the constitutional and statutory law of that state; the case in which it was first involved and ruled being that of Lewis *v.* City of Raleigh, 77 N. C. 230, in which a municipal corporation was held liable in damages for the death of a person, the jury having found that his death was "accelerated by the noxious air of the guard house" of the city, in which he was confined. The decision of the court was expressly based upon the wise and humane provision of the constitution of the state, which provided that "it shall be required by competent legislation that the structure and superintendence of penal institutions of the state, the county jails and city police prisons, secure the health and comfort of the prisoners," and upon certain provisions of the Code of that state with reference to furnishing necessary supplies to jailers, and the care to be taken by sheriffs and jail keepers of prisoners and the rooms in which they are confined. And in the opinion in Moffitt *v.* City of Asheville, *supra*, AVERY, J., said that when the aldermen of Asheville, who were vested with authority to erect a city prison, "built the police guard house in the exercise of their power, the city became as fully amenable for its proper construction and superintendence, as the general assembly was required by the constitution to make it answerable by competent legislation." But he further said, "The defendant, in the discharge of its judicial duties, could not have incurred any liability, in any view of the case, but for the express provisions of the constitution and laws." For the sake of humanity, we can but regret that there are no such express provisions in the constitution and laws of our own state in reference to municipal prisons. The only case that we have found in which a municipal corporation has been held liable in damages for injuries sustained by a person confined in its

prison, in consequence of its unwholesome condition, where there was no express constitutional or statutory provision upon which to base the decision, is that of Edwards *v.* Town of Pocahontas (C. C.), 47 Fed. 268, in which DISTRICT JUDGE PAUL held "that a town which used a jail of its own was liable for injuries to the health of a prisoner caused by its filthy condition, since, under section 927 [of the Code of Virginia], and a special provision of its charter, it might have used a county jail, subject to inspection and control." In view of the decisions of this court in reference to the nonliability of a municipal corporation when exercising governmental functions, and the overwhelming weight of outside authority in cases similar to the one we have under consideration, we are constrained to hold that the defendant is not liable to the plaintiff for any injuries which he may have sustained while confined in the city guard house, by reason of its improper construction and unwholesome condition, or by reason of the failure of the municipal authorities to provide the means by which he could have protected himself from the inclemency of the weather during his imprisonment.

2. We think that the municipal corporation was not liable for another reason. The petition alleges that the plaintiff "was without just cause arrested by the police officers of the city of Griffin without a warrant, and was placed in a certain place, called the 'guard house' of the said city"; that "he was not drunk or disorderly, and no reasonable cause can be assigned for such conduct on the part of the city government, and he was not guilty of any violation of law whatever." If he was arrested without just cause, was not drunk or disorderly, was not guilty of any violation of law whatever, and no reasonable cause can be assigned for the conduct of the police officers in arresting and imprisoning him, then, clearly, his arrest and consequent imprisonment were the result of the tortious acts of the police officers, and for such acts committed by its policemen a municipal corporation is not liable. Section 744 of the Political Code provides that "a municipal

Illegal Arrest by Policeman—Liability of Municipality.

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corporation is not liable for the torts of policemen or other officers engaged in the discharge of the duties imposed on them by law." "A municipal corporation is not liable to an action for damages for the illegal arrest of a citizen by one of the police officers of the city." Cook *v.* Mayor, etc., 54 Ga. 468; McElroy *v.* City of Albany, 65 Ga. 387. Nor for the consequent imprisonment of the person arrested. Harris *v.* City of Atlanta, 62 Ga. 290. In Attaway *v.* Mayor, etc., 68 Ga. 740, the plaintiff alleged that the marshal and a policeman of the city, "in executing the commands of the said mayor and aldermen, did arrest and imprison him for the space of ten days in the calaboose of the said city, without lawful warrant, and without the authority of law; that the said imprisonment was wanton, inhuman, and brutal, because of the size, ventilation, and filthy condition of said calaboose"; and "that by reason of said unlawful imprisonment he became sick." In the court below there was a demurrer to the declaration, which was sustained; and this court affirmed the judgment upon the ground "that the city is not liable for the illegal acts of police officers," the court citing the three cases last above cited.

3. The defendant corporation was not liable for the act of the mayor in requiring the plaintiff to give a larger bond than the law authorized. In fixing the amount of the bond, the mayor acted in a judicial capacity, and for an error committed in the exercise of judicial authority a municipal corporation is not liable. Pol. Code, § 748; Bartlett *v.* City of Columbus, *supra*. Judgment affirmed. All the justices concurring.

Liability for Acts of Mayor—Excessive Appearance Bond.

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NOTES.

**Negligence in Keeping Jail—Liability of Municipality for Injury to Prisoners.**—See *note*, 3 Mun. Corp. Cas. 455.

In Brown's Adm'r *v.* Town of Guyandotte, 34 W. Va. 299, it was held that a town is not liable for damages for the death of a person caused by the burning of its jail while such person was confined therein by town authority for a violation of its ordinances, though

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such fire was attributable to the wrongful act or negligence of the officers or agents of the town.

In City of New Kiowa *v.* Craven, 46 Kan. 114, the plaintiff sued to recover damages for the death of her husband caused by his confinement in defendant's jail. Plaintiff alleged that the city prison was a small wooden building, poorly ventilated, dark, filthy, and uninhabitable; that the city of New Kiowa failed to properly ventilate the prison, or provide a bed for persons confined therein to sleep; that on account of the exposure and confinement in the prison, together with being compelled to breathe the poisonous air thereof, her husband, contracted a violent disease, of which he afterwards died. The jury found a verdict against the city and judgment was entered thereon. The supreme court, in reversing the judgment, said: "It is contended on the part of the city that the case of La Clef *v.* City of Concordia, 41 Kan. 323, is decisive against the right of any recovery by the plaintiff below. In that case it was decided that, where a person is confined in a city prison, upon a conviction for disturbing the peace and quiet of the city, the city is not liable for damages for injuries sustained by such person by reason of the bad character of the prison, or the negligence of the officer in charge of the same. On the part of plaintiff below it is insisted that the La Clef Case is not conclusive. It is stated that there are statutes making it the duty of a city of the third class, to which class the city of New Kiowa belongs, if it undertakes to keep and maintain a city prison, that it shall be comfortable and safe. The only statutes referred to by counsel for plaintiff below in support of their assertion are: Paragraph 1013, Gen. St. 1889. * * * And Paragraph 3552, Gen. St. 1889. * * * Neither of these statutes makes it the duty of a city of the third class to keep or maintain a comfortable and safe city prison. Paragraph 1013 gives a city marshal authority to keep all persons arrested in the city prison, county jail, or other proper place. By this statute no duty is imposed upon the city. Paragraph 3552 is a part of the statute concerning county jails, and has no application to city prisons or jails. Notwithstanding this statute, it was decided in Pfefferle *v.* Commissioners of Lyon Co., 39 Kan. 432, that 'a county is not liable to the inmates of its county jail for negligently permitting such jail to become and remain in such a bad condition that the inmates thereof become sick and diseased.' If a county is not liable under this statute for negligently permitting its jail to become and remain in a bad condition, certainly it cannot be claimed that this statute, which was adopted to control county jails, and not city jails, will make a city liable for negligently permitting its jail to become and remain in an unhealthy condition. It would be illogical and unjust to hold that a statute concerning county jails, that did not and could not make counties liable for fail-

ing to keep a comfortable and safe county jail shall be so construed as to make cities liable for failing to keep a comfortable and safe jail. Upon the evidence presented upon the trial, the plaintiff below was not entitled to recover. See, also, Peters v. City of Lindsborg, 40 Kan. 654, 24 Am. & Eng. Corp. Cas. 502. The judgment of the district court will be reversed, and the cause remanded for further proceedings, in accordance with the views herein expressed. All the justices concurring."

In Richmond v. Long, 17 Gratt. (Va.) 375, the city of Richmond was held not liable for loss of a slave admitted as a smallpox patient into the city hospital, because of the negligence of its agents there allowing him to escape and freeze. Its principle was approved by the Missouri court in Murtaugh v. St. Louis, 44 Mo. 379, holding that city not liable to a non-paying patient at its hospital for injuries resulting from negligence and misfeasance of the officers and servants of the institution.

**Same—Same—Rule in North Carolina.**—A city authorized by statute to erect a city prison is not, if it has built a reasonably comfortable prison and furnished those in charge of it with everything essential to prevent bodily suffering on the part of the prisoners from excessive cold heat, or hunger, and to protect their health, liable for injuries received therefrom, even if the suffering or sickness was caused by neglect of the jailer to keep the fires burning all night, and to give the prisoners the necessary bedclothing. Moffit v. Asheville, 103 N. Car. 237, 25 Am. & Eng. Corp. Cas. 189. But it is liable if the city has not provided a place of imprisonment where the prisoner can be made reasonably comfortable. Lewis v. Raleigh, 77 N. Car. 229.

**Same—Same—Same—Knowledge of Officers.**—When the window-glass in the windows of a police prison has been broken, and the bedclothing furnished for its inmates has been destroyed, but the governing officers of the city are not shown to have had actual notice of the breaking or destruction, or to have been negligent in superintending the management of the prison, the city is not liable for injuries to health sustained by a prisoner therefrom, under a constitutional provision which requires that the structure and superintendence of police prisons shall secure the health and comfort of the prisoner. Moffit v. Asheville, 103 N. Car. 237, 25 Am. & Eng. Corp. Cas. 189; Shields v. Durham, 116 N. Car. 394.

But knowledge will be presumed where the jail has been in an unfit condition for several months. Shields v. Durham, 118 N. Car. 450, 36 L. R. A. 293.

And the fact that knowledge of the jail's condition was not obtained by the city authorities at a meeting of the commissioners does not render it any less binding. Shields v. Durham, *supra*.

BEAN

*v.*

CITY OF MIDDLESBORO.

(*Court of Appeals of Kentucky, June 13, 1900.*)

**Municipal Corporations—Liability for Torts of Police.***—A city is not responsible for an unlawful arrest by its police.

**Hucksters—Violation of Ordinance—License Fees—Voluntary Payments.**†—After defendant's arrest for alleged violation of an ordinance requiring hucksters to take out a license, and before the trial, under a warrant, by an arrangement with the city authorities he took out a license, for which he paid $10, and the warrant was dismissed. *Held*, that the $10 was voluntarily paid, and could not be recovered, even though the sale by him was no violation of the ordinance.

APPEAL by plaintiff from Bell county circuit court. *Affirmed.*

*G. W. Saulsberry*, for appellant.

*T. G. Anderson*, for appellee.

HOBSON, J. On August 13, 1898, appellant was in the city of Middlesboro, selling watermelons, and was arrested for selling the melons without license, under the following city ordinance: "Every huckster doing business in the city of Middlesboro shall pay a license of ten dollars per annum: provided, however, that the provisions of this section shall not be so construed as to apply to any person or persons living in the country that may bring to the city any country produce or marketing of their own raising and sell the same from his or their wagons, whether to the store or upon the streets to the citizens." After appellant's arrest, and before

*See Gray *v.* Griffin (Ga.), *ante* and *foot-note.*

†See *notes*, 2 Mun. Corp. Cas. 249 *et seq.*

the trial, under the warrant, by an arrangement with the city authorities he took out a license, for which he paid $10, and the warrant against him was dismissed. After this, on August 16th, he filed this suit in the Bell circuit court to recover the $10 paid by him, and $1,000 damages for his arrest; alleging that the watermelons were of his own raising, and that under the ordinance he was not required to take out a license. The court below sustained a demurrer to his petition, and dismissed the action.

When appellant was arrested, he had his election to stand his trial before the police court, and, on proof of his innocence, to secure his discharge. If the melons he was selling were of his own raising, and he had established this fact, it would have defeated the prosecution. He saw fit, however, not to follow this course, but to take out a license, and in this way to secure the dismissal of the warrant. The city authorities could not know that the melons were of his own raising, without proof. Though his arrest was unlawful, the city was not responsible for the tort of the police. Dill. Mun. Corp. § 975; Pollock *v.* City of Louisville, 13 Bush 221. The $10 was voluntarily paid for the license, and appellant enjoyed whatever benefits the license conferred. The ordinance was a valid one. It was for appellant to determine whether he would pay under the ordinance, or stand his trial under the warrant. Having made his election, and secured whatever benefits were to be derived from this course, he cannot recover the money he voluntarily paid. Dill. Mun. Corp. § 944. Judgment affirmed.

Municipal Corporations—Liability for Torts of Police.

Hucksters of—Violation of Ordinance—License Fees—Voluntary Payments.

CITY OF DAVENPORT

*v.*

BOYD *et al.*

(*Supreme Court of Iowa, Oct. 12, 1899.*)

**Title to Real Property—Action by City—Estoppel.***—Where a city has taxed property and levied special assessments upon it for 30 years, and defendant has occupied it under a claim of right for 19 years, before an action by the city to recover possession thereof, and it does not appear that defendant has misled plaintiff's officers, nor been guilty of any bad faith, and plaintiff's rights could have been readily ascertained at any time during the 30 years, the city is estopped in such action to assert its title to the property.

APPEAL by plaintiff from Scott county district court. *Affirmed.*

*E. M. Sharon*, for appellant.
*Davison & Lane*, for appellee.

ROBINSON, C. J. The material facts admitted or established by the evidence are as follows: The land in controversy is a strip of ground 60 feet in width and 178 feet in length, between Harrison and Ripley streets, which extend from north to south, and is claimed by the plaintiff to be a part of Seventh street, which is 60 feet wide, and extends from east to west, and would constitute a part of that street if it were made continuous. The defendant claims to be the absolute owner of the tract. In the year 1852 it was included in the plat of McIntosh's Second addition to the city of Davenport, as an unnamed tract between two blocks. It was replatted in the year 1856, and the tract shown as a part of Seventh street. A portion of the property of which it had been a part was again replatted in the year 1878 by one Watkins, who then owned it, and the tract in controversy was then shown as an unnamed tract between two blocks. In October, 1879, Wat-

*See note at end of case.

kins executed to the defendant a quitclaim deed for the tract, describing it as a strip of land 60 feet in width, adjoining the south side of the west half of original block 1 of McIntosh's Second addition to the city of Davenport. At the same time the defendant purchased of Watkins the two lots in the block described, north of and adjoining the tract in question. Within a few weeks after receiving the deed he moved a house onto the tract, and has since held possession of it. The highest part of the tract was about 25 feet above the grade of the street, and the defendant leveled it at a cost of $300. Although the defendant took possession of the land under a quitclaim deed, and should have known that it did not vest in him the title of the tract, he appears to have claimed to own it since he obtained the deed, and has in all respects treated it as his own. The city taxed it from the year 1867 until the year 1896, inclusive, as "the sixty foot south of the west half of block 1, McIntosh's addition (Second) to the city of Davenport," and the defendant has paid all the taxes so levied since he obtained the deed from Watkins. A sewer tax was also levied against the tract, and all of the installments due when this action was commenced had been paid by the defendant. Three years before the trial he was required by the plaintiff to construct a sidewalk in front of the tract, and did so. He claims title through the conveyance by Watkins to him, and by adverse possession, and alleges that the plaintiff is estopped by the course it has pursued respecting the tract from claiming title to it.

Ths defendant has failed to show a valid title to the tract acquired through the Watkins conveyance, and for the purposes of this case it may be conceded, as claimed by the plaintiff, that the statute of limitations will not run against a municipal corporation. See City of Waterloo *v.* Union Mill Co , 72 Iowa 437, 34 N. W. 197; Taraldson *v.* Town of Lime Springs, 92 Iowa 187, 60 N. W. 658. But it is the well settled rule in this state that counties, cities, and towns may so deal with real property within their limits as to be estopped to assert title to it; and that has most frequently occurred by refraining from exercising acts of ownership over

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the property, by treating it as owned by private persons, and by subjecting it to the payment of various public charges. Thus, in Smith *v.* City of Osage, 80 Iowa 84, 45 N. W. 404, it was said, "The city will be estopped to set up any claim to land to which the right of public use has been abandoned by subjecting it to taxation as private property," and numerous decisions of this court were cited to sustain that statement of the law. The case of Simplot *v.* City of Dubuque, 49 Iowa 630, is in some respects much like this case, and in that it was held that the right of the city to occupy the land there in controversy for the purposes of a street must be regarded as abandoned, and that the city was estopped to deny the right of the plaintiff to the land. See, also, Austin *v.* Bremer Co., 44 Iowa 155; Audubon Co. *v.* American Emigrant Co., 40 Iowa 460; Adams Co. *v.* Railroad Co., 39 Iowa 507; Iowa R. R. Land Co. *v.* Story Co., 36 Iowa 48. The cases of Smith *v.* Gorrell, 81 Iowa 218, 46 N. W. 992, Orr *v.* O'Brien, 77 Iowa 253, 42 N. W. 183, and Davies *v.* Huebner, 45 Iowa 574, furnish illustrations of the rule that there may be an estoppel by abandonment and adverse occupation under claim of right for more than 10 years. In this case the city, as we have seen, taxed the property and levied special assessments upon it for 30 years, and the defendant occupied it under a claim of right for 19 years, before this action was commenced. It does not appear that the defendant deceived or misled the officers of the plaintiff, nor that he was guilty of any bad faith. The rights of the plaintiff could have been readily ascertained at all times. In view of the well-established facts of the case, we are of the opinion that it is governed by the rule of Smith *v.* City of Osage, *supra*, and similar cases. It follows that the judgment of the district court was right, and it is affirmed. Affirmed.

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NOTE.

**Taxation of Land Does Not Estop City to Claim Title.**—In St. Louis *v.* Gorman, 29 Mo. 593, it was held that the unauthorized act of its officers in assessing taxes against land to a citizen and selling

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it at a tax sale after it was returned as delinquent did not estop the city to claim title, as the purchaser was charged with notice of the powers of the officers. See Berry *v.* Beckford, 63 N. H. 328; Rossive *v.* Boston, 4 Allen (Mass.) 57.

In Plumb *v.* Grand Rapids, 81 Mich. 381, it was held, that the fact that the officers of a city had certain land which the city claimed to have been dedicated for park purposes assessed and sold for taxes, does not estop it from claiming the land, for such action on the part of its officers was without authority and void, as the property belonged to the city and was exempt from taxation.

A city is not estopped from claiming title to land between high and low-water mark by having designated it for years, upon its maps, as the property of an individual, and having assessed taxes and the expenses of improvements thereon as his property, and collected the same from him. McFariane *v.* Kerr, 10 Bosw. (N. Y.) 249.

The fact that the taxing officers of a city assessed taxes upon certain lots according to a plat showing the bounds of such lots, though, according to such plat, the lots would lie partly in the space covered by a public road, cannot estop the public, nor cut off their right to the use of the road. Ellsworth *v.* Grand Rapids, 27 Mich. 249.

A city may claim property as a public street even though it has taxed such property after its dedication. Hull *v.* Cedar Rapids (Iowa), 83 N. W. Rep. 28; Reynolds *v.* Newton, 14 Ohio C. C. 433.

A city is not estopped to claim land as a public highway by the collection of a sewer tax thereon. Busse *v.* Central Covington, 19 Ky. L. Rep. 158, 39 S. W. Rep. 848.

After the dedication of land as a street had been accepted, officers of the city taxed such land and levied local assessments against it, and subsequently instituted condemnation proceedings against it. *Held*, that such acts did not estop the city to claim that the land was a street. Myers *v.* Toledo, 9 Ohio C. D. 676. And such acts will not bind one claiming under the city. Jarvis *v.* Lynch, 157 N. Y. 445, 52 N. E. Rep. 657.

The unauthorized taxation of land against the original owner does not estop the city to claim that it had been dedicated. Rhodes *v.* Brightwood, 145 Ind. 21.

In Simplot *v.* Dubuque, 49 Iowa 630, it was held that a city was estopped to deny the ownership of one whom it had allowed to occupy land under claim of right and who had paid the taxes which it had levied upon such land.

HECHINGER

*v.*

CITY OF MAYSVILLE.

(*Court of Appeals of Kentucky, June 20, 1900.*)

**Prostitutes—Ordinance to Prevent Association with—Validity.***—An ordinance to prevent association with prostitutes on the streets, which exempts all male relatives of a prostitute from its operation, and does not so exempt her mother or sister, and contains no provision for legitimate business transactions with such persons, is invalid.

APPEAL by defendant from Mason county circuit court. *Reversed.*

*J. N. Kehoe*, for appellant.

*Thomas M. Wood*, for appellee.

GUFFY, J. The sole question presented for decision is the validity or constitutionality of the following ordinance, being an ordinance of the city of Maysville, a fourth class city. The ordinance reads as follows: "Be it ordained by the board of council of the city of Maysville that it shall be unlawful for person or persons other than the husband, father, brother or male relative, to associate, escort, converse or loiter with any female known as a common prostitute, either by day or by night, upon any of the streets or alleys of the city of Maysville, and any person or persons other than the said husband, father, brother or other male relative, so offending shall upon conviction thereof before the police court in said city be fined not less than $5.00 nor

*See note at end of case.

more than $20.00." The appellant was fined under the ordinance in question, and prosecuted an appeal to the circuit court for the purpose of testing the validity of the ordinance, as provided by law. The circuit court adjudged the ordinance valid, and to reverse that judgment this appeal is prosecuted.

We have carefully considered the very able briefs filed by counsel for appellant and appellee. In the main, the arguments are sound: but the question is whether the authorities cited by either counsel sustain his contention. Manifestly, the ordinance was intended to accomplish a proper and laudable object. But it seems to us that it is not properly guarded. It will be seen that, in addition to the husband, father, or brother, any male relative may escort, converse, loiter, or associate with the objectionable character mentioned. There can be no good reason in exempting any male relative from the operation of the ordinance except a husband, father, or brother. It would also seem that a mother or sister should be allowed the same privilege as allowed to the father or brother. Any person should be allowed to converse with such a female long enough to transact any necessary and legitimate business, and no one should be punished for a violation of an ordinance such as the one under consideration unless the party so offending had knowledge or information of the character of the disreputable person with whom he was associating. We are, however, inclined to the opinion that under the ordinance in question no person could be legally fined unless he had knowledge or information of the disreputable character of such female. We think the ordinance as it stands is invalid, but one conforming to the views herein indicated would be clearly within the police power of the city council, and would be a proper and commendable exercise of the police power. For the reasons indicated, the judgment is reversed, and cause remanded, with directions to the court below to enter a judgment adjudging the ordinance in question invalid, and for proceedings consisted herewith.

Note

**Ordinance Prohibiting Association with Prostitutes, etc., Unconstitutional.**—In *Ex parte* Smith, 135 Mo. 223, an ordinance forbidding any one "knowingly to associate with persons having the reputation of being thieves, burglars, pickpockets, pigeon droppers, bawds, prostitutes, or lewd women or gamblers, [*] or any other person, for the purpose or with the intent to agree, conspire, combine, or confederate, first, to commit any offense, or second, to cheat or defraud any person of any money or property," was held unconstitutional as an invasion of the right of personal liberty. The court said: "We deny the power of any legislative body in this country to choose for our citizens whom their associates shall be. And as to that portion of the 8th clause which uses the words, "for the purpose or with the intent to agree, conspire, combine or confederate, first, to commit any offense," etc., it is quite enough to say that human laws and human agencies have not yet arrived at such a degree of perfection as to be able, without some overt act done, to discern and to determine by what intent or purpose the human heart is actuated. So that, did we concede the validity of the former portion of the 8th clause, which we do not, still it would be wholly impracticable for human laws to punish, or even to forbid, improper intentions or purposes; for with mere guilty intention, unconnected with overt act or outward manifestation, the law has no concern. Howell *v.* Stewart, 54 Mo. 404. In Fitz's Case, 53 Mo. 582, the ordinance in question, then known as the 9th clause (§ 1, art. 4, chap. 20, Rev. Ord. 1871), was like the present one down to the asterisk (*) just after the word "gamblers," but did not contain the words "for the purpose or with the intent to agree," etc. But in that case, however, the ordinance was so amended by judicial construction as to be held valid, and afterwards the common council, acting upon that hint, conformed the ordinance to such construction, so as to supply the words therein indicated, to wit, "for the purpose or with the intent to agree, conspire," etc. But notwithstanding such emendations and additions as aforesaid, this court, in the quite recent case of St. Louis *v.* Roche, 128 Mo. 541, held the 8th clause, in so far as heretofore quoted, invalid on the distinct ground that it invaded the constitutional right of personal liberty, and Fitz's Case was overruled."

## *Ex parte* McKENNA.

(*Supreme Court of California, Oct. 24, 1899.*)

**Licenses — Discrimination — Trading Stamps — Lotteries.*** — The passage of an ordinance imposing a license tax of $200 per quarter on all merchants making a practice of issuing trading stamps, is not warranted on the ground that the trading stamp device is a lottery in disguise, and therefore immoral.

**Same—Same—Same—Ordinances.**—Such an ordinance is oppressive and unreasonable, and therefore void.

APPEAL by defendant from Fresno county superior court. *Defendant discharged.*

*Frank H. Short*, for petitioner.

BEATTY, C. J. The petitioner was arrested upon a complaint charging him with the offense of carrying on and conducting at the city of Fresno the business of selling trading stamps redeemable in money, merchandise, or other things, and so redeeming the same, without the necessary license, contrary to the provisions of a city ordinance, etc. This charge is in the language of an ordinance of the city of Fresno imposing a license tax of $200 per quarter upon all persons carrying on such a business. The prisoner contends that the ordinance is oppressive, discriminating, prohibitory, and unreasonable; that it is therefore void, and his imprisonment unlawful. Fresno is a city of the fifth class, and has the power to license, for the purposes of regulation and revenue, all kinds of business, lawful games, etc. In pursuance of this power, it has adopted a general ordinance imposing a graduated license tax upon merchants, ranging from $2.50 to $25, according to the amount of monthly sales; $25 being

*See note at end of case.

the amount required of those whose sales equal or exceed $30,000 per month. The ordinance in question here is a recent amendment to the general license ordinance, and, in exacting from every person issuing trading stamps, no matter how insignificant his monthly sales, a tax eight times the amount required of merchants doing the very largest business without the use of such stamps, was evidently designed to be prohibitory, as it necessarily must be with respect to any dealer whose profits do not considerably exceed $200 per quarter. The sole question to be decided is whether such an ordinance is so oppressive, discriminating, and unreasonable that a court may pronounce it invalid upon that ground.

The complaint upon which the prisoner was arrested means nothing more than this: That in conducting the business of a merchant he makes a practice of issuing stamps or tickets, which he agrees to redeem, and does redeem, in merchandise or money. If such a practice is not embraced within the terms of the ordinance, the complaint charges no offense, and the imprisonment is, of course, unlawful. But it is claimed on the one hand, and conceded on the other, that the ordinance was intended to apply, and does apply, to the practice alleged, and, as above stated, the sole question is the validity of the regulation. In support of the ordinance, it is contended that the trading-stamp device is a lottery in disguise, and therefore immoral. But we cannot see that it has any resemblance to a lottery. There is in it no element of chance, and nothing in the nature of gaming. It appears to be simply a device to attract customers, or to induce those who have bought once to buy again, and in this aspect is as innocent as any form of advertising. And, besides, if it were a lottery in disguise,—a mere device to cloak a gambling scheme,—it would be unlawful, and not the subject of a license. The ordinance, therefore, cannot be upheld on this ground. It is not an ordinance to pro-

Licenses—Discrimination—Trading Stamps—Lotteries.

hibit an immoral practice or to regulate a hazardous or offensive business, or the conduct of a lawful game or public exhibition. It is, under the guise of a revenue measure, an evident attempt to put an end to the issue and redemption of trading stamps by levying a discriminating and prohibitory tax upon those dealers who resort to that method of attracting customers. Many decisions are cited by the petitioner in which the courts of other states have condemned and set aside municipal ordinances such as this, upon the ground that they were unreasonable and contrary to public policy because in restraint of trade, but it is contended on the part of the people that this court in the case of *Ex parte* Haskell, 112 Cal. 412, 44 Pac. 725, has established a different principle and rule of decision. It was said in that case that a municipal ordinance must be very clearly obnoxious to the objection that it is oppressive and unreasonable before it will be declared invalid by the court. "Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the lawmaking power, and a contrary conclusion will never be reached on slight consideration. It is the province and right of the municipality to regulate its local affairs, within the law, of course, and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the constitution, or laws made in pursuance thereof." Upon these principles it was held that an ordinance of the city of Chico imposing a license tax of $50 a quarter upon traveling salesmen could not be declared invalid merely because it imposed a license somewhat less in proportion upon merchants having a fixed place of business within the city. The ground of that decision was that the manner in which Haskell conducted his business—by which he avoided the payment of rents, property tax, etc.—made it an essentially different business from that conducted by regular merchants, and was therefore a good reason for discrimination. The same cannot be said

Note

in defense of the Fresno ordinance. The persons to whom it applies pay the same rents and local taxes as other merchants, and it is not perceived how the issue of trading stamps makes theirs an essentially different business, or furnishes any justification for a discriminating ordinance. It is not necessary, therefore, to overrule, or in any respect to depart from the doctrine of, the Haskell Case, in order to pronounce the ordinance here in question invalid. Accepting the principles above quoted from the opinion in that case, it remains that in this case there is lacking a ground of discrimination which was there found to be sufficient to support the ordinance. Besides, there is no hard and fast line which divides the reasonable from the unreasonable, in such matters. Where the question is in doubt, as in the Chico Case, the ordinance will be upheld, but there may be such a palpable discrimination that there can be no doubt. We think this case furnishes an instance. To tax the smallest retail establishment eight times as much as the largest mercantile business, merely on account of its method of advertising or attracting customers, is clearly unreasonable. The prisoner is discharged.

Same—Same—Same—Ordinances.

We concur: TEMPLE, J.; HARRISON, J.; HENSHAW, J.

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NOTE.

**Licenses—Constitutionality of Ordinance.**—An ordinance imposing a license fee on persons dealing in trading stamps or patronizing them is not in violation of the fourteenth amendment of the Federal Constitution, nor of the provision of the Arkansas Constitution in reference to equality of taxation. Humes *v.* City of Ft. Smith (C. C.), 93 Fed. Rep. 857.

FIELD

*v.*

VILLAGE OF WESTERN SPRINGS.

(*Supreme Court of Illinois, Oct. 16, 1899.*)

**Injunctions—Dismissal of Bill for Want of Equity.**—Where the bill is for injunction only, and, on motion for injunction, it is refused for want of equity in the bill it is not error to refuse to allow defendant to answer.

**Local Improvements—Authority of City Council—Province of Court.***—The question of the necessity of a city local improvement is, by law, committed to the city council, and the courts have no right to interfere to prevent the improvement, unless it clearly appears that such discretion has been abused.

**Same—Oppressive Ordinance—Remedies.**—Although an ordinance providing for a local improvement is oppressive, an injunction to prevent its being carried out will not be granted if the property owner has a complete and adequate remedy at law.

APPEAL by plaintiff from Cook county circuit court. *Affirmed.*

This is a suit for an injunction, filed July 13, 1898, by complainant, a taxpayer, and owner of real estate in the village of Western Springs, Cook county, Ill., to restrain said village from carrying out the provisions of a certain ordinance passed by it on May 24, 1898, for the construction of a cement sidewalk in front of certain blocks situated in said village, upon the ground that the ordinance was unreasonable and oppressive, and therefore void. The ordinance in question was based upon the sidewalk act of April 15, 1875. The village of Western Springs filed a general demurrer to complainant's original bill, which, upon argument, was sustained by the circuit court. Thereupon the complainant, by leave of court, filed instanter his

Case Stated.

*See note at end of case.

amended bill of complaint, and moved thereon for an injunction as originally prayed. The bill alleges that complainant is, and has been for many years past, a resident of Chicago, Cook county, Ill.; that he is interested in the premises described in the ordinance above referred to, together with adjacent premises occupying considerably more than one-half a section of land (the whole being now known as "Howard Butcher's Subdivision"), as the owner of certain mortgages thereon now in process of foreclosure in the circuit court of Cook county, Ill., and also as a taxpayer in said village of Western Springs; that, owing to the large number of parties (considerably over 200) required to be made defendants in said foreclosure proceedings, the vigorous defenses made by them, the large amount of money due complainant (being upwards of $300,000) on account of principal and interest and taxes and assessments due from the mortgagors and secured by said premises, it is probable that said foreclosure proceedings will be carried through the appellate and supreme courts of the state, and that title to said premises cannot be made marketable for many years to come; that the amount secured by said premises exceeds the market value of the same, and that complainant will probably be obliged to bid in and hold the premises upon the sale thereof for his protection, and is therefore the prospective owner of the fee-simple title absolute therein; that on May 24, 1898, the village of Western Springs passed the ordinance above referred to, which is set out in full in the record; that the streets referred to in said ordinance, and shown upon the plat set out in the abstract as intersecting said Howard Butcher subdivision (except Hillgrove avenue, which is the same street as that referred to in the ordinance as Chicago street), exist in name only, and have never, in fact, been laid out upon said premises; that Chicago street is an unpaved, uncurbed, ungraded, and but little used dirt roadway, largely overgrown with grass and weeds; that none of said blocks 28 to 31, inclusive, and 36 to 39, inclusive, referred to in said ordinance, have ever been

subdivided into lots, nor has any building or other improvement ever been erected thereon, or upon any of the blocks in said Howard Butcher subdivision; that, on the contrary, said premises are now, and for several years last past have been, used exclusively for the raising of hay; that, owing to the foreclosure proceedings pending and above referred to, it will be impossible to make title to the said lots marketable for many years to come; that the cement sidewalk called for by said ordinance, if laid in front of said premises, will be seriously injured, if not entirely ruined, whenever dwellings or other improvements are laid along the line of the said walk, or whenever Chicago street is improved, both through the usage to which said sidewalk will be subjected by teams and workmen in the course of such construction and improvements and on account of the necessary laying of house drains, water and other connections between said dwellings and said Chicago street; that the south line of said Chicago street, throughout its entire length, borders on the right of way of the Chicago, Burlington & Quincy Railroad Company, and that in consequence no residences or other improvements now exist, or can hereafter exist, along the south line of said Chicago street; that, in consequence of the above facts, no benefit can accrue from the construction of said sidewalk to the premises touching thereon and described in said ordinance; that the village of Western Springs adopted the method in said ordinance providing for the construction of the said sidewalks, *viz.* by special taxation, under the sidewalk act of 1875, upon the blocks of land touching thereon, for the express purpose of preventing complainant from raising the question of benefits accruing to the said abutting land from the construction of said walk; that said village had theretofore, whenever attempting to secure the construction of improvements of this nature, provided for the payment of the same by special assessment upon the premises speially benefited thereby, wherein said question of benefits might be lawfully raised; that with the exception of two or three short pieces of cement sidewalk in front of prem-

ises improved by residences, and so laid privately and voluntarily by the respective owners of said premises, there is not in the whole village of Western Springs another sidewalk similar in its composition or approaching in cost the sidewalk called for by the ordinance in question; that the sidewalk so called for is the most expensive kind of sidewalk known, is one-half mile in length, and that its construction as provided for in said ordinance would cost complainant in the neighborhood of $2,000; that fully 90 per cent. of the sidewalks now in use, and which have been in use for many years past in said village, are constructed of crushed limestone, and that the cost of construction of such a crushed limestone walk or of a suitable board sidewalk in front of the said premises, which would be in all respects safe and sufficient for public use and travel, would be little more than one-half the cost per lineal foot of the sidewalk called for by said ordinance; that there was laid, several years ago, in front of blocks 36 and 37, referred to, and now exists in good condition, and in all respects safe and sufficient for public use and travel, a crushed limestone walk similar in all respects to the other sidewalks in said village of Western Springs; that the only reason or excuse suggested by said village of Western Springs for the construction of a sidewalk in the ordinance referred to is that it would be convenient and useful for certain children residing in the village of Western Springs who attend a high school located in said village of Lagrange; and complainant shows and charges in this connection that the number of children so attending said high school is small,—not above 10. The bill further charges that a special assessment for the purpose of the construction of an electric light plant in the said village was provided for by ordinance in June, 1897, and that appellant resisted the confirmation of the same, and on the overruling of his objection he prosecuted an appeal to this court, and charges that the sidewalk ordinance which is sought to be enjoined was passed for the purpose of punishing the complainant for his resistance to the electric light assessment, and that he has

not constructed the sidewalk for that reason, and that the sidewalk ordinance is grossly unreasonable, unjust, unfair, and oppressive, and prays an injunction. The ordinance is made an exhibit. On the filing of said amended bill the court held there was no equity therein, and denied the motion for an injunction, whereupon counsel for the defendant moved for leave to file an answer to the bill, which latter motion was overruled, and the defendant excepted, and the court ordered the amended bill to be dismissed for want of equity, and at the cost of complainant, to which the complainant excepted, and prosecutes this appeal.

*Williams, Holt & Wheeler*, for appellant.
*Frederick A. Willoughby*, for appellee.

PHILLIPS, J. (after stating the facts). It has been held by this court that where a bill for injunction only is before the court, and a temporary injunction has been granted, a motion to dissolve the injunction for want of equity has the same effect as a demurrer to the bill, and the court, on sustaining the motion to dissolve the injunction, may properly dismiss the bill, and is not required to retain the same for hearing of pleadings and proofs. Titus *v.* Mabee, 25 Ill. 257; Weaver *v.* Poyer, 70 Ill. 567; Prout *v.* Lomer, 79 Ill. 331; American Live-Stock Commission Co. *v.* Chicago Live-Stock Exch., 143 Ill. 210, 32 N. E. 274. On principle, the the same rule would prevail where a bill is filed for injunction only, which, on hearing, is refused. The bill may, in such case, be dismissed for want of equity, for the same reason as in a case where a preliminary injunction has been granted, and a motion has been entered to dissolve the same. In this case the bill is for injunction only, and on motion for an injunction, which is refused by the chancellor because of the want of equity in the bill, it was not error to refuse to allow the defendant to answer; nor was it error, if the bill was without equity, to dismiss the same on the refusal of the injunction.

Injunctions—Dismissal of Bill for Want of Equity.

Field *v.* Village of Western Springs

The gist of the bill is that the ordinance is unreasonable, unjust, unfair, and oppressive. The ordinance for the construction of the sidewalk by a resort to special assessment as a means of raising money to pay for the improvement was enacted under the sidewalk act of 1875, which has been held by this court a valid act. White *v.* People, 94 Ill. 604. The question of the necessity of a local improvement is, by the law, committed to the city council, and courts have no right to interfere to prevent such improvement except in cases where it clearly appears that such discretion has been abused. The ground on which courts interfere is that the ordinance is so unreasonable as to render it void. McChesney *v.* City of Chicago, 171 Ill. 253, 49 N. E. 548; Peyton *v.* Village of Morgan Park, 172 Ill. 102, 49 N. E. 1003; Walker *v.* Village of Morgan Park, 175 Ill. 570, 51 N. E. 636. In the latter case it was said (page 573, 175 Ill., and page 637, 51 N. E.): "From the allegations of the bill it is apparent that the real ground relied upon to defeat the ordinance providing for the construction of the sidewalk is that the locality where the sidewalk is ordered constructed is so thinly settled that there is no necessity whatever for the construction of a sidewalk; that no sidewalk was needed where it was ordered to be made. What the public necessities were was a question solely for the determination of the president and board of trustees of the village of Morgan Park, and, when the incorporation clothed with power has acted in strict conformity to the statute conferring the power, as was the case here, its decision must be held final and conclusive, unless it is apparent that the action of the municipality is unreasonable, unjust, and oppressive, as held in Hawes *v.* City of Chicago, 158 Ill. 653, 42 N. E. 373. It may be that there was no pressing demand for the sidewalk in question, and that it would, in the end, have been better had its construction been postponed until the population of the village had increased; but that was a mat-

Local Improvements—Authority of City Council—Province of Court.

Field v. Village of Western Springs

ter for the board of trustees to settle for themselves. * * * The rule is that it requires a clear and strong case to justify a court in annulling the action of a municipal corporation acting within the apparent scope of its authority. No such case was made by the bill here. No sidewalk had ever been laid over complainant's property: and while we do not think a great necessity existed for the improvement, still we do not regard the action of the village so unreasonable, unjust, and oppressive as to call upon a court of equity to interfere." In McChesney *v.* City of Chicago, *supra*, it was claimed that appellant had a plank sidewalk in front of his lot, which was up to grade, and in good repair, and on objection to confirmation it was insisted the improvement was unnecessary, and it was held the objection was not sustained. Under the averments of this bill it cannot be said that it does not appear that the sidewalk in question would be of convenience to the public, nor does it appear that there is such a sidewalk, and in such a condition, as affords sufficient accommodation to the public who have occasion to go along the premises in which the complainant has an interest. It does appear that no sufficient sidewalk exists.

Complainant relies on the case of Hawes *v.* City of Chicago, 158 Ill. 653, 42 N. E. 373, as being a case identically in point with this case, where it was held that the sidewalk ordinance was unreasonable, unjust, and oppressive, and therefore null and void That case and this are entirely dissimilar. In the Hawes Case the owner of a large tract of unimproved property, in conformity with the requirements of the city council, put down a good and sufficient plank sidewalk, which was in good condition. That walk, so constructed in conformity with the ordinance, was 1,256 feet long. Five months after it had been put down, and when it was in good condition, and safe and sufficient for public use, the city council passed another ordinance, which required the plank walk to be torn up, and a cement walk to be constructed, at a cost to Hawes of $1,915. To require that he should build a board sidewalk in conformity to the city's plans, and, when this expense had

been incurred and while that walk was in good condition, in so short a time thereafter to further require it to be torn up, and another walk to be laid, was an imposition on the property owner that was so unreasonable, unjust, and oppressive that it was well held that an injunction could issue to restrain the enforcement of such second ordinance. But no such question is presented before the court here. Even if it should be conceded that the ordinance was unjust and oppressive because of being unreasonable, still the appellant would have a complete remedy at law. In Peyton *v.* Village of Morgan Park, *supra*, which was an appeal from a judgment confirming a special assessment for curbing with concrete and paving with brick certain streets, objections were heard by the trial court to the legality of the assessment on the ground that the ordinance was unreasonable and oppressive, in view of the character of the streets, the improvements along them, and the uses to which they were put; and this court, in passing upon the same on appeal, said: "The improvement was not wholly useless, and we are not prepared to say that the ordinance is void for unreasonableness, or that the court erred in overruling the objections on that ground." In McChesney *v.* City of Chicago, *supra*, an objection was made that the improvement was unnecessary, because, it was claimed, the appellant had a sidewalk in front of his lot, which was up to grade, and in good repair; and this court held on appeal that the ground on which courts interfere is that the ordinance is unreasonable to such an extent as to render it void, and that under the proofs in that case it could not be so held. The two cases last mentioned were cases of confirmation of the assessment, and sufficiently indicate that a complete remedy at law would exist, based on the objection that the ordinance was unreasonable, oppressive, and unjust, and, if such could be shown to be the case by evidence, the court could grant the relief sought in this case. Where the remedy at law is complete and adequate, equity will not assume jurisdiction. We are of opinion that there

Note

is no error in the record, and the judgment of the circuit court of Cook county is affirmed. Judgment affirmed.

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NOTE.

**Public Improvements—Necessity—By Whom Determined.**—The question of the necessity of a street improvement which is to be met by local assessment is for the municipal government alone. Bullitt *v.* Selvage, 20 Ky. L. Rep. 599, 47 S. W. Rep. 255; State *v.* Neodesha, 3 Kan. App. 319, 45 Pac. Rep. 122.

The mayor and council are the final judges of the utility of the prescribed improvement, and if any of the proprietors have been damnified, his remedy, if any, is by action, not by resisting the enforcement of the order. Louisville *v.* Hyatt, 2 B. Mon. (Ky.) 177, 36 Am. Dec. 594.

The council of a city is the proper judge of the necessity of widening a street. Meyer *v.* Covington, 20 Tex. Civ. App. 239, 45 S. W. Rep. 769.

The expediency of a public improvement rests with the legislature or local authorities, and in the determination of such a question the parties affected have no constitutional right to be heard before the assessment is made, on the ground that the improvement is not beneficial, unless it manifestly appears that the legislature abused its discretion, or that no benefit will ensue. Lent *v.* Tillson, 72 Cal. 404, 19 Am. & Eng. Corp. Cas. 640.

Benefit to the owner of the real estate assessed, so far as necessary to be passed upon, as well as the necessity or reasonableness of the improvement, being for the determination of the legislature, is concluded by the act authorizing the assessment, and will not be inquired into by the courts, unless in extraordinary cases presenting a manifest abuse of legislative authority. Speer *v.* Athens, 85 Ga. 49, 32 Am. & Eng. Corp. Cas. 301.

The levy of an assessment by a city council which is authorized by law to make such levies is *prima facie* evidence that the conditions were such as to warrant it being made. Nalle *v.* Austin (Tex.), 56 S. W. Rep. 954; Seaboard Nat. Bank *v.* Woesten, 147 Mo. 467.

The question of the advisability or necessity of a proposed improvement is for the mayor and municipal assembly and not subject to review by the courts. St. Louis *v.* Brown (Mo.), 56 S. W. Rep. 298; Cason *v.* Lebanon (Ind.), 55 N. E. Rep. 768.

By the Maryland act of 1838, c. 226, the determination of the necessity of an improvement is exclusively vested in the mayor and city council of Baltimore; and whether their judgment be right or wrong, is

no subject for revision or correction in a court of equity. Methodist P. Church *v.* Baltimore, 6 Gill (Md.) 391, 48 Am. Dec. 540.

In Michener *v.* City of Philadelphia, 118 Pa. St. 535, 22 Am. & Eng. Corp. Cas. 328, it was held that the councils are the sole judges of the necessity of improvements, and their judgment is conclusive, and that it was not the province of the court to encroach upon the functions of other public officers.

Under the laws of Kentucky the municipal authorities are vested with the power to decide as to the necessity for the construction or reconstruction of sidewalks. Hackworth *v.* Louisville A. S. Co., 20 Ky. L. Rep. 1789, 50 S. W. Rep. 33; Purdy *v.* Drake, 17 Ky. L. Rep. 19, 32 S. W.Rep. 939.

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## HUFFMIRE *et al.*

*v.*

## CITY OF BROOKLYN.

(*Court of Appeals of New York, May 1, 1900.*)

**Municipal Corporations—Liabilities of Annexed Territory—Parties.***—Where a municipal corporation is legislated out of existence, and its territory annexed to another, the latter, in the absence of a statutory provision to the contrary, is the proper party defendant in an action to recover damages on account of a liability incurred by the former prior to the annexation.

**Same—Same—Statute.**—The provisions of chapter 356, Laws 1894 of New York, limiting and defining the liabilities of the city of Brooklyn for debts and obligations of the town of Flatbush prior to its annexation to the city, were simply intended to confine the area of taxation for such debts and obligations to the territory which would have been liable but for such annexation.

**Discharging Sewage upon Oyster Bed—Liability of City.†**—Where a city, in lawfully operating a properly constructed sewer, damages a private oyster bed under public water, by discharging sewage upon it through 300 feet of public water, such injury is not consequential, but direct, amounting to a taking of private property, for which the city must make compensation.

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*See Broadfoot *v.* City of Fayetteville (N. Car.), 2 Mun. Corp. Cas. 527, and *note*, 540 *et seq.*

†See notes at end of case.

Huffmire *v.* City of Brooklyn

APPEAL by defendant from appellate division, Second department supreme court. *Affirmed.*

*John Whalen*, Corp. Counsel (*William J. Carr*, of counsel), for appellant.

*Frederick E. Crane*, for respondents.

WERNER, J. This action was brought to recover damages to a bed of oysters planted by the plaintiffs in Mill creek, which is tide water bordering upon that portion of the city of Brooklyn formerly known as the town of Flatlands, Kings county, N. Y. These oysters were planted under a permit issued to the plaintiffs by the justice of the peace and the supervisor of said town of Flatlands, pursuant to the provisions of chapter 734, Laws 1868. This act, in substance, provides that any person who has been an inhabitant of the town for a period of six months prior to making application may, upon complying with the provisions of the act, acquire the right to plant oysters under the public waters within said town, and have "the exclusive property in the oysters so planted, and the exclusive use of said oyster beds." The first permit received by the plaintiffs was issued in December, 1882. The rental or license fee was $10 a year. This permit was renewed from year to year until 1892, when the plaintiffs omitted to procure a formal renewal thereof, but continued to plant and gather oysters as before. On the 9th of February, 1893, the plaintiffs paid $20, which included the rental for 1892, and renewed their permit until December, 1893. The damage to plaintiffs' oyster bed was caused by the discharge of sewage thereon from one of defendant's sewers. The history of this sewer, and its relation to this controversy, is as follows: By chapter 161, Laws 1889, the legislature authorized the town of Flatbush to build a sewer to empty into the waters of Jamaica Bay, of which Mill creek is a part. This sewer was constructed so that its outlet was about 300 feet from

plaintiffs' oyster bed and was first used in January, 1893. Soon after it was in operation, the plaintiffs discovered that their oysters were covered with and ruined by tar and "sludge acid"; substances which were being discharged from the mouth of said sewer. The town of Flatbush constructed the sewer in question; but by chapter 356, Laws 1894, said town was annexed to and became a part of the city of Brooklyn, being designated as the Twenty-Ninth ward thereof. Section 4 of said act provides that the city of Brooklyn shall not be or become liable to pay "any debt, liability or obligation of the town of Flatbush * * * contracted or incurred prior to the time this act shall take effect, * * * but the property in such town * * * as now constituted * * * shall remain liable for said debts, liabilities and obligations, and the moneys to meet the same, principal and interest, as they accrue, shall be raised by taxation upon the property of said town." The act further provides that the taxes levied for these purposes, when collected by the city of Brooklyn, shall be paid over to the county treasurer or other proper officers charged with the duty of paying such indebtedness, and exempts the territory above described from certain general city taxes.

The first question presented for our consideration, although not seriously urged upon the argument, is whether the city of Brooklyn is the proper defendant in such a case as this. As this action was not brought until after the town of Flatbush had become merged in the city of Brooklyn, the latter is undoubtedly the proper party defendant in any case which might have been brought against the former before such merger. Where a municipal corporation is legislated out of existence, and its territory annexed to another, the latter, unless the legislature otherwise provides, is entitled to the property and liable for the debts of the former. Dill. Mun. Corp. (4th Ed.) § 186. The provisions of chapter 356, Laws 1894, limiting and defining the liability of the defendant for debts and obliga-

Municipal Corporations—Liabilities of Annexed Territory—Parties.

tions of the town of Flatbush prior to its annexation to the city of Brooklyn, were simply intended to confine the area of taxation for such debts and obligations to the territory which would have been liable but for such annexation. This is made clear by other provisions of the same act exempting the territory annexed from the payment of certain taxes levied for the exclusive benefit of the city of Brooklyn as it was constituted prior to 1874. Any other construction of the annexation act referred to would leave remediless those having lawful claims against the former town of Flatbush. That town no longer exists. By the act of 1894 it became a part of the city of Brooklyn, and the latter is now the only legal entity which can be brought into a court of justice upon claims against the former. We therefore address ourselves to the principal question, which arises upon defendant's contention that it is not liable in any event. It seeks to shield itself from liability herein by the application of the rule that in the construction or operation of a public work under legislative authority or direction a municipal corporation is not answerable for such a consequential injury as may result to others where there is no negligence in such construction or operation. We recognize the controlling force of this familiar and now well-settled principle. It is founded upon the transcendent power of the legislature, within constitutional limitations, to enact whatever it may deem essential to the public welfare. The question which most frequently arises in cases where this rule is invoked is whether the injury complained of is purely consequential, or is so direct as to amount to a taking of property which entitles the party injured to compensation under the constitution. That is the precise question here presented. The plaintiffs contend that the casting of noxious and destructive substances upon their oyster bed was not a consequential, but a direct, injury. The defendant insists that the discharge of the sewer in question into the waters of Mill creek is simply the consequential result of obedience

Same—Same—Statute.

Discharging Sewage upon Oyster Bed—Liability of City.

to the legislative mandate, and that, in the absence of negligence on the part of the municipal authorities in the construction and operation of said sewer, the defendant is not liable. Applying the rule which the defendant invokes in all its force and breadth, we think this case falls directly within the constitutional inhibition against the taking of property without compensation. The plaintiffs were lawfully in possession of a piece of land under water upon which they had planted a bed of oysters. They held their title under legislative authority, which was as ample and unquestioned as that under which defendant's sewer was constructed. Although this land was under public waters, it was as much the private property of the plaintiffs as though it had been a tract of farm land held under a lease from the town of Flatlands under legislative authority. The act of the defendant in pouring its sewage upon this land was not consequential. It was as direct as though it had been discharged upon a piece of land owned or rented by the plaintiffs, and used for farming or gardening purposes. In the latter case a municipal corporation could not successfully defend its trespass because it was acting under legislative authority, or because its sewage had been carried to the lands of the person complaining over the lands of others. The fact that plaintiffs' land was under public water, and that defendant's sewage was discharged upon it, after passing through 300 feet of public water, the land under which was not in the possession or control of the plaintiffs, does not differentiate this case in principle from the illustrative case of a discharge of sewage upon surface lands. In either case the injury is so direct as to amount to an invasion of a private right, which no legislative sanction or direction can justify or excuse. These views are, we think, sustained by abundant authority. Early in the history of this court the distinction was clearly pointed out between direct and consequential injury to private lands in the prosecution of public work performed under legislative direction. The case of Radcliff's Ex'rs *v.* Mayor, etc., 4 N.

Y. 205, was one in which the plaintiffs were held not entitled to recover for injuries to their lands occasioned by a change of grade in the street adjoining the same. None of their lands had been taken or invaded. In speaking of the rule applicable to such cases, JUDGE BRONSON said: 'Private property cannot be taken for public use without making just compensation to the owner, and a law which authorizes the taking without providing for compensation must be unconstitutional and void. But laws which authorize the opening and improving of streets and highways, or the construction of other works of a public nature, have never been held void because they omitted to provide compensation for those who, though their property was not taken, suffered indirect or consequential damages." In Bellinger *v.* Railroad Co., 23 N. Y. 47, the defendant, under legislative authority, constructed a railroad embankment in such a manner as to cause a stream to overflow the lands of the plaintiff. JUDGE DENIO, in discussing the right of the railroad company to do the act complained of, said: "This is, of course, to be understood as limited to cases in which the legislature has the constitutional power to act. If, therefore, a corporation or an officer should be authorized by a statute to take the property of individuals for any purpose, however public or generally beneficial, without compensation, or, for a private use, making compensation, the pretended authority would be wholly void, and, of course, could afford no protection to any one. But this limitation has no application to cases where property is not taken, but only subjected to damages consequential upon some act done by the state or pursuant to its authority." In Atwater *v.* Trustees, 124 N. Y. 602, 27 N. E. 385, cited by defendant, and arising out of a state of facts similar to those in the Bellinger Case, *supra*, the distinction above adverted to was again recognized by this court in the following language: "In the present case the action of the defendants in the performance of the work was confined within the limits where they had the right to execute it, and the effect upon property beyond those bounds, resulting in

damages, was the consequence of such performance of the work, and not the direct act of its execution by them. In that respect this case is distinguishable from that of St. Peter *v.* Denison, 58 N. Y. 416. There the defendant was held liable because, by casting stone upon the premises, he committed a trespass; and the fact that he was engaged in the performance of a public work, and the fragment of rock was in the process of blasting thrown upon the land of another, was no justification. Here the injury to the plaintiffs' premises was not done directly by any act of the defendant, but it was the consequence following and traceable to the work as the cause. In the one case the act of the party was, and in the other not, a direct invasion of the premises of the plaintiff."

But even more directly in point are Noonan *v.* City of Albany, 79 N. Y. 476, and New York Cent. & H. R. R. Co. *v.* City of Rochester, 127 N. Y. 591, 28 N. E. 416. In the first of these cases it was held: "A municipal corporation has no greater right than an individual to collect the surface water from its lands or streets into an artificial channel, and discharge it upon the lands of another; nor has it any immunity from legal responsibility for creating or maintaining nuisances." In the other case it was decided that "a municipality may not empty its sewers upon private property without acquiring the right so to do." The same doctrine was held to apply in Seifert *v.* City of Brooklyn, 101 N. Y. 143, 4 N. E. 324, which was an action brought to recover damages alleged to have been caused to plaintiff's premises by defendant's negligence in the construction of a sewer. There CHIEF JUDGE RUGER stated the rule, which is applicable here, as follows: "It is a principle of the fundamental law of the state that the property of individuals cannot be taken for public use except upon the condition that just compensation be made therefor; and any statute conferring power upon a municipal body, the exercise of which results in the appropriation, destruction, or physical injury of private property by such body is inoperative, and ineffectual to protect it from

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liability for the resultant damages, unless some adequate provision is contained in the statute for making such compensation. * * * Where * * * the acts done are of such a nature as to constitute a positive invasion of the individual rights guarantied by the constitution, legislative sanction is ineffectual as a protection to the persons or corporation performing such acts from responsibility for their consequences." The foregoing authorities sufficiently illustrate the underlying principle which must control the decision of this case. Briefly recapitulated, it is that when, in the exercise of authority conferred upon them by the legislature, municipal corporations perform acts as a result of which some indirect or consequential injury is sustained by an individual, the latter has no right of action for such injury. Such injuries are *damnum absque injuria*. But when a municipal corporation takes the property of an individual it must pay for it.

We have not lost sight of defendant's contention that the deposit of sewage on the plaintiffs' land was not a taking of their property. We are of the opinion that any direct invasion of a man's land is a taking of his property within the meaning of the constitution. The destruction of plaintiffs' oysters by the casting of sewage upon them was as clearly a taking of their property as the physical removal and conversion of the same would have been. The judgment of the court below should be affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, and VANN, JJ., concur. CULLEN, J., not sitting.

Judgment affirmed.

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NOTES.

**Discharging Sewage upon Private Property—Liability of Municipality.**—Where the construction and use of a sewer by a municipality necessarily results in discharging sewage upon private property, the municipality is liable for such injury to such property, although the sewer is not defective.

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*United States.*—Pumpelly *v.* Green Bay & Miss. Canal Co., 13 Wall. 166.

*Georgia.*—Smith *v.* Atlanta, 75 Ga. 110.

*Illinois.*—Jacksonville *v.* Lambert, 62 Ill. 519; Dierks *v.* Highway Com'rs, 142 Ill. 197.

*Indiana.*—Columbus *v.* Hydraulic Woolen Mills Co., 33 Ind. 435; Evansville *v.* Decker, 84 Ind. 325; Crawfordsville *v.* Bond, 96 Ind. 236; Fort Wayne *v.* Coombs, 5 West. Rep. 233, 107 Ind. 75.

*Iowa.*—Van Pelt *v.* Davenport, 42 Iowa 308.

*Massachusetts.*—Middlesex Co. *v.* Lowell, 149 Mass. 509, 25 Am. & Eng. Corp. Cas. 187; Perry *v.* Worcester, 6 Gray 544; Bacon *v.* Boston, 154 Mass. 100; Merrimac River Locks, etc., *v.* Lowell, 7 Gray (Mass.) 223.

*Michigan.*—Ashley *v.* Port Huron, 35 Mich. 296.

*New Hampshire.*—Vale Mills *v.* Nashua, 63 N. H. 136; Rowe *v.* Portsmouth, 56 N. H. 291; Eaton *v.* Boston, C. & M. R. R. Co., 51 N. H. 504.

*New York.*—Bolton *v.* New Rochelle, 84 Hun 281; Bastable *v.* Syracuse, 8 Hun 587; Beach *v.* Elmira, 22 Hun 158; Noonan *v.* Albany, 79 N. Y. 476; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 466; Schriever *v.* Johnstown, 71 Hun 232; Barton *v.* Syracuse, 36 N. Y. 54; Byrnes *v.* Cohoes, 67 N. Y. 204; Stoddard *v.* Saratoga Springs, 127 N. Y. 261, 38 Am. & Eng. Corp. Cas. 235; Story *v.* New York Elevated R. Co., 90 N. Y. 122; Seifert *v.* Brooklyn, 101 N. Y. 136.

*Vermont.*—Winn *v.* Rutland, 52 Vt. 481.

*Wisconsin.*—Arimond *v.* Same, 31 Wis. 316.

Where sewage from the streets of a municipal corporation is discharged upon private property through a sewer laid upon other private property and used by the municipality as a conduit for such sewage, and is the only outlet provided for its discharge, the municipality is liable for the damages thereby caused. Stoddard *v.* Village of Saratoga Springs, 127 N. Y. 261, 38 Am. & Eng. Corp. Cas. 235.

A city that constructs a sewer so that its contents are thrown upon improved premises used by the owner as his residence, and the persons living therein are made sick by the noxious odors, is liable in damages at the suit of the property owner, not only for the decreased rental value of the premises, but also for the loss of time and expenses incurred by reason of such sickness. Loughran *v.* City of Des Moines (Iowa), 34 N. W. Rep. 172.

**Drain Constructed without By-Law—Deposition of Sewage on Private Land by Reason of Excavations Thereon—Liability of Municipality.**—A municipal corporation having constructed a drain without a by-law for the particular portion passing through private property, whereby noxious matter was brought down and deposited thereon,

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was held liable for damages sustained thereby, notwithstanding that there was excavation on the land, but for which the noxious matter might have passed off, the owner not being bound to leave his land in a state of nature; nor was it any answer that the drain was used for similar purposes by others as well as the corporation. Close *v.* Corporation of the Town of Woodstock, 23 Ont. Rep. 99, 42 Am. & Eng. Corp. Cas. 506.

**Causing Overflow of Water-Course.**—Where a natural water-course exists upon the land of one person, and a sewer is constructed which empties upon the land of the person a greater body of water than the natural drainage and flow through the water-course, whereby the premises are injured, such sewer is wrongful. O'Brien *v.* St. Paul, 18 Minn. 176.

**Discharging Water on Premises.**—In an action for damages caused by cutting sewer in such a manner as to collect and throw large quantities of water on the plaintiff's premises which otherwise would not have flowed upon them, *held*, that city was liable. Ashley *v.* Port Huron, 35 Mich. 296.

**Mill-Race.**—In Columbus *v.* Hydraulic Woolen Mills Co., 33 Ind. 435, a city was restrained from cutting a ditch so as to drain its streets into a mill-race.

**Injury to Mill-Pond.**—A city is liable for damages caused an individual land-owner by discharging a public sewer upon his land, and into his mill-pond. Vale Mills *v.* Nashua, 63 N. H. 136.

**Injury to Wharf.**—The owner of a wharf upon a creek into which sewers of a city discharge, cannot maintain a private action for any loss or injury to him arising merely from an obstruction to navigation caused by the sewers. If the effect is merely to create a bar across the mouth of the creek, so as to destroy or injure its navigability, he cannot maintain an action because they render approach to his wharf more difficult and expensive, or because his wharf is rendered less valuable. Those would be injuries of the same kind sustained by all other persons who have occasion to use the creek, or who owned land bordering upon it. But if the effect of the sewers is to fill up the creek directly in front of and adjoining the plaintiff's wharf, so that vessels cannot lie at the wharf on account of the diminished depth of water, this is an injury, special and peculiar to him, for which he may maintain an action. He has a right to the water at his wharf at its natural depth. If, by the filling up of the creek, his use of his wharf for the purposes for which it had been constructed and actually used is impaired, he is subject to an inconvenience and injury which is not common to the public. Brayton *v.* Fall River, 113 Mass. 218.

**Eminent Domain.**—If a village permits its sewage to be deposited on the land of an individual, it amounts to the taking of his land

within the purview of the constitutional requirement for compensation. Winn *v.* Rutland, 52 Vt. 481.

In Pumpelly *v.* Green Bay Co., 13 Wall. 166, it was held that the backing of water so as to overflow the lands of an individual, amounted to a "taking" of this property. Consequently, it has been held that a city may not so construct its sewers as to discharge them on the land of an individual.

**Drainage into Sea.**—The right of a city to construct sewers or drains, and to discharge them into the sea, is subject to some limitations. It does not include the right to create a nuisance, public or private. If the sewers or drains are so built or managed as to create a public nuisance, the defendants are indictable; if a private nuisance is created, they are answerable in damages to the person injured. Brayton *v.* Fall River, 113 Mass. 218.

**Property-Owner's Drain Connected with Sewer.**—Dermont *v.* Detroit, 4 Mich. 435, was an action on the case for injury caused by the water from one of the public sewers flowing back through the plaintiff's private drain into his cellar. The court held that the defendant was not liable, on the ground that the injury was caused by the plaintiff's private drain being connected with the sewer. As the plaintiff had no right to connect his drain with the sewer, the city was not responsible for the injuries. See also Kobs *v.* Minneapolis, 22 Minn. 158, 164; Danbury Ry. Co. *v.* Norwalk, 37 Conn. 109. See also Pettigrew *v.* Evansville, 22 Wis. 223.

**Drainage of Surface Water—Liability of Municipality for Injury to Land.**—See Town of Thorntown *v.* Fugate (Ind.), 1 Mun. Corp. Cas. 62, and extensive *note*, 66 *et seq.*

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## Nevins

*v.*

## City of Fitchburg.

(*Supreme Judicial Court of Massachusetts, Nov. 29, 1899.*)

**Sewers—Injury to Land—Liability of Municipality.***—If municipal authorities so construct a sewer that it ends at a private tail race constructed under and across a public road, and owned by the proprietor of the land on both sides of the road, the municipality is liable for the damage thereby caused the landowner.

*See Huffmire *v.* Brooklyn (N. Y.), *ante* and *note*.

Nevins *v.* City of Fitchburg

REPORT from Worcester county superior court. *Affirmed.*

*C. E. Ware* and *W. S. B. Hopkins*, for plaintiff.
*Edward P. Pierce*, for defendant.

LATHROP, J. There is nothing in the bill of exceptions to show by what authority the board of aldermen passed the vote in this case authorizing the laying out of the sewer. The answer sets up that it was done under the Public Statutes, and the defendant, in its brief, states inferentially that it was under Pub. St. c. 50, which, by section 1, gives to the mayor and aldermen of a city the right to lay, make, and maintain such main drains or common sewers as they adjudge to be necessary for the public convenience or the public health, through the lands of any persons or corporations. Assuming that the vote was passed by the board of aldermen under this statute, the defendant concedes that, if a board of public officers should decree that a sewer should be so constructed that it would discharge upon private lands, a remedy by injunction or otherwise could be afforded, because the act done or to be done would be without the jurisdiction of the board, and would, in effect, be the taking of private property for public uses without proper condemnatory proceedings. We think that this concession was properly made. Thus, in Hill *v.* City of Boston, 122 Mass. 344, 358, it was said by CHIEF JUSTICE GRAY: "So, if a city, by its agents, without authority of law, makes or empties a common sewer upon the property of another, to his injury, it is liable to him in an action of tort;" citing, among other cases, Proprietors of Locks & Canals *v.* City of Lowell, 7 Gray 223, and Haskell *v.* City of New Bedford, 108 Mass. 208. In Proprietors of Locks & Canals *v.* City of Lowell, it was held that a canal corporation could maintain an action of tort against a city for laying down sewers and drains through lands purchased by the corporation for the use of their canal, and emptying into the canal, although the city was authorized by its charter "to cause drains and common sewers to be laid down through streets and private lands,"

and though the canal was constructed in the channel of an ancient water course. See, also, Boston Rolling Mills *v.* City of Cambridge, 117 Mass. 396. So, too, if a sewer is legally laid out and constructed by a city, but is maintained in such a manner as to create a private nuisance, an action at law may be maintained against the city by the persons injured. Haskell *v.* City of New Bedford, 108 Mass. 208; Brayton *v.* City of Fall River, 113 Mass. 218. It has also been held that if a city, by a system of drains, artificially diverts surface water from its natural course, and accumulates it upon the plaintiff's land in such quantities as to create a private nuisance, it is liable to an action. Manning *v.* City of Lowell, 130 Mass. 21, 25; Brayton *v.* City of Fall River, 113 Mass. 218, 226; Bates *v.* Inhabitants of Westborough, 151 Mass. 174, 182, 23 N. E. 1070, 7 L. R. A. 156.

In the case at bar the plaintiff owned the land on each side of the Bemis road, and presumably owned the fee of the road. Its tail race ran under the road by means of a culvert, and was on the plaintiff's land. This condition of things existed prior to 1845. The culvert had never been interfered with by the defendant or by the town of Lunenburg, in whose municipal limits it once was. We need not consider what would have been the rights of the plaintiff if the city had seen fit to extend its sewer so as to injure the plaintiff's rights in the tail race, as nothing of this sort was attempted. The order ends the sewer at the raceway. So long as the city did not lay a sewer across the tail race, the plaintiff had a right to the use of the land under the way. Allen *v.* City of Boston, 159 Mass. 324, 335, 34 N. E. 519. Even if it had not acquired a prescriptive right so to use it, the defendant had no right to have its sewer end on the plaintiff's land, and pour the sewage thereon. The order, therefore, was of no effect, and the judge rightly ruled that the action could be maintained. Judgment affirmed.

## CITY COUNCIL OF AUGUSTA

*v.*

## OWENS.

(*Supreme Court of Georgia, July 14, 1900.*)

**Petition—Sufficiency.**—The petition in this case sets forth a good cause of action, and therefore the court did not err in overruling the general demurrer thereto.

**Same—Same.**—There was no merit in the special demurrer based upon the ground that the petition did not allege where the quarry was located. It was sufficient in this respect, because it informed the defendant of the time of the injury that occurred at this quarry, the name of defendant's superintendent of the work there, gave a general description of the quarry, and set forth such facts and circumstances as would leave no room for uncertainty or doubt in the mind of the owner, who was the defendant, as to what quarry was referred to in the petition.

**Injury to Employee—Vice Principals.**—Where a municipal corporation is engaged in operating a rock quarry which it owns, a person placed there by its authority as general superintendent of the work, with power to direct the movements of its laborers, not joining with them in the labor, and being as to this business the city's sole and only representative, is the vice principal, and not the fellow servant of the workmen under his charge; and this is so whether it was within the scope of his authority to engage the workmen or not.

**Same—Same—Liability for Negligence of Fellow Servant.**—Though the immediate cause of a physical injury to an employee may be the negligent act of a fellow servant, the master is liable, if the fellow servant did this act under and in obedience to an order given by a vice principal of the employer, if the giving of the order was itself an act of negligence as to the defendant.

**Same—Duty to Furnish Safe Place to Work.**—There was no error in the court charging the jury: "It was the duty of the defendant to furnish a reasonably safe place for this man to work. It was the right of the plaintiff to assume that the place was safe when he was directed to go to it." In the light of the pleadings, testimony, and the entire charge of the court, the language quoted, which is, abstractly considered, a correct statement of a general rule of law, was not calculated to mislead the jury.

City Council of Augusta *v.* Owens

**Instructions—Municipal Corporations—Power to Operate Quarry.*** —A request to charge on a defense not set up by the answer, either by affirmative statement, or by denial of any of the allegations in plaintiff's petition, was properly refused. There being an agreed statement of facts "that the tract of land on which this accident happened formerly belonged to the Augusta Canal Company; that the right to quarry was conveyed to the city council of Augusta, under the provisions of the act of 1849, and that the city council of Augusta has police jurisdiction over the track; * * * that this tract comes within the provisions of the act,"—it was not *ultra vires* to operate the quarry for the purpose of obtaining material to repair the streets or a canal which the defendant had authority to own and operate.

**Same—Same—Evidence—Operation of Quarry—Ministerial Act.**—The testimony in the present case showing that the operation by defendant of the quarry in question was a ministerial act on its part, and there being no evidence to indicate that the work in which the city was engaged was governmental in its nature, the court did not err in refusing a request of defendant's counsel to charge the jury on this subject.

**Same—Same—Personal Injuries—Damages—Diminished Power to Labor.**—A person whose capacity to labor has been permanently diminished by physical injury wrongfully inflicted upon him by another can recover damages therefor, notwithstanding there may have been no proof as to what such person's earnings were before or after the injury. Hence there was no error, in the light of the pleadings and the evidence in this case, for the court to charge the jury on the subject of the right of plaintiff to recover for his decreased capacity to work, if the jury found from the evidence that the injury received was permanent.

**Same—Same—Same—Same—Same.**—There being nothing either in the pleadings or the evidence which gave the jury a right to find any damages growing out of the diminished earnings of plaintiff for his labor resulting from the alleged injury, it was error for the court to charge the jury to inquire whether there would have been any increase in plaintiff's earning capacity if this injury had not occurred, and to say how much that was affected by the injury, and then allow what they believed would compensate him for that loss.

**Case at Bar.**—The above covers all the questions of importance made by the present record. While there are several other grounds in the motion for a new trial relating to requests to charge, after comparing them with the entire charge of the court actually given, they are not of sufficient merit to require notice. The charge, as a

*See Duncan *v.* Lynchburg (Va.), 3 Mun. Corp. Cas. 540.

whole, except as specified in the ninth headnote above, was full and fair, and covered all the material issues between the parties. The judgment denying a new trial is reversed only because of the error therein indicated.

(Syllabus by the Court.)

ERROR by defendant from Richmond county city court. *Reversed.*

*Wm. H. Barrett*, for plaintiff in error.

*J. R. Lamar* and *E. B. Baxter*, for defendant in error.

LEWIS, J. Benjamin Owens instituted in the city court of Richmond county an action for damages against the city council of Augusta, substantially making by his petition the following case: Defendant in May, 1897, at the time of the injuries to plaintiff hereinafter mentioned, owned and operated a certain quarry, from which it was engaged in obtaining rock to be used by it in making improvements on its streets, in keeping the same in proper repair, and for other like corporate purposes, within the scope of its duty and authority. It had in its employ a large number of laborers, who were engaged in getting out rock from the quarry for defendant's use as aforesaid. On said date plaintiff was engaged as one of said laborers in defendant's employ. This work at defendant's quarry was conducted under the superintendence, supervision, and control of one John Joy, who directed the same; being clothed by defendant with full power and authority, as its representative and agent, over the actual conduct of the work at said quarry. His duties were those of supervision, direction, and control. Petitioner and all the laborers and employees were, while engaged in said work, amenable to his orders,—required to obey them, and to look to him, as their superior, for direction in said work. They were thus subordinated to him, as their superior or principal. He had authority to discharge them for cause. This quarry at the time mentioned, consisted of a large, level space or area, at the back of which rose, almost perpendiculary, to

Case Stated.

the height of 80 or 90 feet, a wall of rock, from which, by blasting, drilling and quarrying, rock was obtained for defendant's use, and from whose face the rock, when loosened, fell to said area, whence it was removed. On said date plaintiff went to his work as usual at the quarry, and during the early portion of the morning Joy ordered him, with two other laborers, to go to the foot of said quarry, the base of said wall of rock, and there drill a hole pointed out by said Joy, in order that a blast might be placed therein, which work was in the usual line of plaintiff's employment at the quarry; his duty being, in connection with drilling said hole, to drive the drill with a hammer. One of the other two laborers held the drill, while the third was engaged with plaintiff in driving the same. While beinng thus occupied for a short time, and when in the act of striking the drill, a piece of rock, falling from above, struck him upon the head, inflicting injuries hereinafter set out. At the time the order was given him by Joy, the said Joy, without warning to petitioner, negligently ordered two other laborers to go to a point on the face of the quarry wall almost directly over the spot where plaintiff was at work when struck, and about 75 feet above him, and there to quarry out some rock which had been loosened by a blast. One of said laborers, in obedience to said orders, after reaching the place designated by Joy, in ignorance of petitioner's position, in the usual and ordinary method, did, with a crowbar, loosen and move, without negligence, from its place, a large piece of rock; and the same rolled down the face of said wall, and in its course broke in pieces, one of which struck plaintiff on the head. It was charged: That the act of said Joy in sending laborers to quarry out rock almost above plaintiff's head was gross negligence, was in reckless disregard of the safety of plaintiff and those working with him, and was a violation of the duty which Joy owed plaintiff. That this improper and negligent conduct of Joy rendered plaintiff's position excessively and unusually perilous, and perilous in a manner and to an extent which plaintiff could not possibly have antici-

pated or foreseen, and that this conduct was the cause of plaintiff being struck by the rock and injured. Plaintiff did not know or suspect, nor could he by proper diligence have known or suspected, that said laborers were quarrying above him. That he was thereby subjected by defendant, acting through Joy, to a risk not reasonably incident to his employment, and when he was hurt he was exercising all due care and diligence. The blow rendered him unconscious, and he remained so for some time. Was carried to a hospital, where he remained for several weeks under the care of a competent physician. That his skull was crushed in by the blow. That a portion of same had to be removed, and that his brain is now protected at that point only by his scalp. As a result thereof, he is constantly exposed to danger of serious injury, and even death. That he is thereby caused great and constant distress and apprehension of mind. That said condition will be permanent. That he suffered great pain after the injury, has continued to suffer ever since, and will continue to suffer such pain as long as he lives. His capacity to labor and earn money has been greatly and permanently diminished, and this condition of impaired capacity will continue. He alleges his damages to be $5,000, for which he prays judgment.

To this petition a demurrer was filed—First, on the ground that there is no cause of action set forth in the petition; and, second, because there is no allegation in the petition showing where the quarry at which the accident occurred is located. This demurrer was overruled, to which judgment exceptions *pendente lite* were filed, and error assigned thereon in the main bill of exceptions. The defendant at the same time answered, and in its answer admitted the truth of the allegations as to owning and operating a quarry, from which it was engaged in obtaining rock for the purposes mentioned in the petition, but it does not admit that such work was within the scope of its duty and authority. It admitted that Joy was in charge, directing the work at the quarry; that petitioner and all the laborers and employees were, while engaged in

said work, amenable to his orders; and that, in so far as these facts warrant the conclusion, said employees were subordinate to Joy,—but denies that Joy had authority to discharge said laborers. It admits the truth of the allegations in the petition which state that Joy ordered two laborers to go to a point on the face of the quarry wall to loosen and throw down rock, and that one of the rocks thus thrown down broke into pieces, and one of the pieces struck plaintiff in the head. It neither admits nor denies, for lack of knowledge, that one of the laborers, in ignorance of petitioner's position, in the usual and ordinary method, did, with a crowbar, loosen and move, without negligence, from its place, a large piece of rock, but denies that the order was given said laborers without warning to petitioner or given negligently, and denies that the spot where said laborers were directed to go was almost directly over the spot where plaintiff was at work when struck. It admits that plaintiff was struck in the head with a rock. The answer further avers that while it is true that, a plane running along the face of the wall of said quarry would be almost perpendicular to the surface of the area in front thereof, the quarrying has been so constructed as to leave along the face of the wall thereof wide ledges, running at an angle from near the top to the bottom thereof, somewhat as roads are built along the face of precipices; that these ledges were so constructed as to be used as slides or ways for rock quarried from the face of the quarry, and rolling along them to the bottom; that such ledges have been used for a long time for such purpose, and are still so used; that such use was safe and proper, was known to petitioner, was a regular incident to the work in which petitioner was engaged, and did not render the position of plaintiff unusually perilous. The answer further alleges: That on the day previous to the injury, and on the morning of the same day as the injury, rock had been loosened and thrown down from the same place whence the rock, a piece of which struck petitioner, was thrown, and petitioner and the other laborers were working in approximately the same place

on the surface of the area below the wall as where petitioner was standing when injured. That such relative position of those working below and those quarrying above was usual, was known to petitioner, and was a regular incident of the work, and that the rock thus loosened or quarried from above had been descending along the ledge provided therefor, without any unusual danger or premonition thereof. The point from which the rock was being loosened was in full view of petitioner, and he did see, or could have easily, by the use of the slightest diligence, seen, the men working there. Petitioner knew the place whence the rock was being loosened, knew that the laborers had been sent there to do this work by throwing down rock, and knew as fully and as well as defendant or any of its agents the danger incident to his position. The injury to plaintiff was caused by an unforeseen accident, without fault or negligence on the part of the defendant, and this defendant should not be held liable therefor.

It is unnecessary to give in this report a synopsis of the evidence. Suffice it to say that the plaintiff by his testimony substantially made out the case alleged in his petition, and the defendant introduced testimony tending to establish the main elements of its defense. The jury returned a verdict for the plaintiff for $2,000, whereupon the defendant moved for a new trial, which was overruled, and upon this judgment error is assigned in the bill of exceptions.

1. We have no hesitancy in saying that this petition set forth a good cause of action, and that the court did not err in overruling the general demurrer thereto. The main charge of negligence which seems to be relied upon by the plaintiff in his pleadings is the conduct of defendant's superintendent of this work at the quarry in sending plaintiff to the particular place where he was hurt, and at the same time, without warning to him, sending laborers to a point almost directly over his head, some 75 feet above him, for the purpose of taking out rock that had been blasted, and tumbling the same down to the

Petition—Sufficiency.

place below where plaintiff was stationed. One of the rocks thus loosened, and intended to be thrown down, doubtless, upon the ledge, broke; and one of the pieces struck plaintiff on the head, causing the injury. As to whether this was negligence, and shown to be negligence by the testimony to the satisfaction of the jury, is a question peculiarly for them to determine; and the court would have erred if it had sustained the demurrer upon the theory that the petition set forth no cause of action.

2. Nor do we think there is any merit in the special demurrer made in this case on the ground that the petition did not allege where the quarry was located. The petition does give a description of the quarry. It alleges that it was owned by the defendant (that is, the city of Augusta); that petitioner was in its employment, at work at the quarry. It further gives the name of the superintendent employed by the defendant to take charge of the work at the quarry, which was not denied. It describes the grounds, and wall of rock, and the character of the work engaged in at the quarry. It does seem that the owner of such an immense industry and enterprise as this would readily have known what particular quarry, even if it had more than one, the plaintiff was alluding to in his petition. In fact, the answer filed at the time of the demurrer shows upon its face that it knew exactly what quarry was referred to in the petition; and, even if there was any error in overruling this special ground of demurrer, it certainly worked no harm whatever to the defendant. In 6 Enc. Pl. & Prac. p. 368, this principle is announced, and the author cites a number of authorities to sustain the text. It is there said: "Although a demurrer may have been improperly overruled, yet, if the demurrant was not harmed by such ruling, judgment will not be reversed on account of the harmless error." Besides this, the principle that, in pleading, less particularity is required when the facts lie as much within the knowledge of the adverse party as in the party pleading, is so well estab- Same—Same.

lished, and sustained by such abundant authority, that we think it useless to discuss or cite authority on the subject.

3. In the third ground of the motion for a new trial, exception is taken to the following charge of the court: "I charge you that if Joy was a foreman or boss of the city quarry where plaintiff was injured, in the sense that he had full control of the operations at the quarry, and full authority to give orders, and to direct and control, as superior, the movements and actions of the employees of the city working in the quarry; and if they were subject to his orders and directions therein; and if he took no part in the actual work at the quarry himself, but merely directed and superintended it; and if he had authority to suspend employees or discharge them, subject to the final action of a higher city official as to such discharge,—then Joy was not a fellow servant of plaintiff, but was the vice principal of defendant." The objection to this was that it took from the consideration of the jury the determination of the fact as to whether or not Joy was a fellow servant with the plaintiff, and shut out from consideration the fact that the city retained the general supervision of the quarry. We think, in the light of the pleadings and the testimony, the charge of the court complained of was entirely correct. It appears from the allegations and the proof that a municipal corporation, the defendant in this case, was engaged in the business of operating a quarry. Joy was placed there by the defendant as a general superintendent of the work, with authority to direct the movements of the laborers,—not joining with them in the labor,—and, as to this particular business, was the city's sole and only representative. It necessarily follows from the facts alleged and proved that the relation he sustained to the plaintiff was that of a vice principal, and not a fellow servant. If his duties, and the power with which he was clothed, did not constitute him a vice principal, then it would be an exceedingly difficult matter to conceive of how any municipality or other corporation could be held responsible for the acts and conduct of any agent

Injury to Employee—Vice Principals.

employed to superintend and control its subemployees. It is complained that this charge excluded from the consideration of the jury that the city retained the general supervision of the quarry. In one sense, that is true; but not more so in this case than corporations have occupied in many other cases in which, under repeated adjudications of this court, they have been held responsible for the negligent acts of subbosses towards employees under their immediate control. This record fails to show that any other official, agent, or employee of the city than Joy had anything whatever to do with superintending the conduct of the work, and directing the laborers engaged therein. In Bain *v.* Machine Works, 75 Ga. 719 (Syl., point 2), it was decided: "Although two persons were employed by the same master, yet where one of them was employed as a blaster for the purpose of removing certain rocks on the master's property, and alone had charge of the work of blasting, and the other had nothing to do with it, but was employed as a wood workman in the foundry of the master, they were not fellow servants, in the legal sense of the term; and a charge based on that assumption was erroneous, though it may have been a correct abstract statement." In Blackman *v.* Electric Co., 102 Ga. 64, 29 S. E. 120, it was decided: "While the person occupying the inferior position is, in a broad and general sense, a co-employee, he is not a fellow servant with the person in authority over him, in the sense he could not recover for injuries sustained by him in consequence of the negligence of such person." See the opinion of JUSTICE ATKINSON, on page 68, 102 Ga., and page 122, 29 S. E., and following, and it will clearly appear from those facts that the person there who was regarded in the capacity of a vice principal did not occupy any more authoritative relation—even if as much—to the employee than did Joy in this case to the plaintiff. See, also, Cooper *v.* Mullins, 30 Ga. 146; Augusta Factory *v.* Barnes, 72 Ga. 227, 228; Krogg *v.* Railroad Co., 77 Ga. 214; Cheeney *v.* Steamship Co., 92 Ga. 726, 19 S. E. 33; Ellington *v.* Lumber Co., 93 Ga. 57, 19 S. E. 21, and authori-

ties cited. The above disposes of the questions raised by the thirteenth, fourteenth, and fifteenth grounds of the motion for a new trial, in which error is assigned upon the refusal of the judge to give to the jury certain requests of counsel for the defendant. The thirteenth ground complains of error in refusing a request to charge the jury as follows: "If you believe that Joy had not power to employ or discharge, but that his duties were only to direct and act as a foreman and boss, directing the men where to work, and engaged in a common pursuit with Owens, you will be authorized to find that Joy and Owens were fellow servants. And if you so find that they were fellow servants, and even should believe that Joy was negligent, and that his negligence caused the injury to Owens, Owens could not recover." The court gave that in charge, with this qualification: "I give you that in charge, gentlemen, with this qualification: That if you find that Joy was not in control and had authority, but was simply a foreman with control of the work assigned them, and was engaged along with the others in the actual work, then he would not be a vice principal, but only a fellow servant, and negligence on his part would not render the city liable." We question very much whether the charge of the court, even with that qualification, was correct, under the testimony in this record; for there was no evidence that Joy was engaged in the same sort of service with this plaintiff. On the contrary, the plaintiff was a common laborer, whose business it was to handle tools, engage in manual labor, and work upon the rock. Joy was not engaged in any such service. He was simply the superintendent and supervisor of the work that was carried on by the laborers in the quarry. We are inclined to think that the testimony did not authorize the charge that was given, and, if there was any error in it, it was against the plaintiff, instead of the defendant. We do not, however, decide this, as no exception thereto was filed by the plaintiff.

4. In the fourth ground of the motion for a new trial it is alleged that the court erred in giving the following charge to

City Council of Augusta *v.* Owens

the jury: "The employer is liable for injuries resulting from the unsafe condition of a working place, even though brought about by the negligence of a fellow servant or fellow servants of the employee, if such fellow servant acted under the orders of the employer, and such orders were negligent on the part of the employer as to the injured party, provided the injured employee was not guilty of negligence in going into the dangerous place." The objection to this was that it prevented the jury from arriving at a conclusion warranted by the evidence,—that the proximate cause of the injury to plaintiff was the negligence of his fellow servant Elliott. From a careful review of the evidence, we are not prepared to say that there was sufficient testimony to charge Elliott with any negligence. We do not decide that question, however, but, assuming that he was negligent, we think the charge was sound law; for the evidence shows that he was simply carrying out the instructions of Joy, for whose negligence the defendant was liable. In Railroad Co. *v.* Phelps, 19 S. E. 652, the supreme court of Virginia decided: "If an injury be caused by the concurring negligence of a fellow servant and a superior who is not a fellow servant, the master is liable." In Augusta Factory *v.* Barnes, 72 Ga. 227, 228, this doctrine is announced in the opinion of JUSTICE HALL, which principle is embodied in the seventh headnote, on page 218. Referring to the case of Railroad Co. *v.* De Bray, 71 Ga. 406, the court says: "We carefully examined our previous decisions, together with the authorities in the text writers, and the cases from the English courts and the courts of this country, and came to the conclusion that, where the plaintiff used all ordinary care and diligence to avoid the injury occasioned by the negligence of the principal's other servants, with whom he was disconnected at the time, and where he was acting in obedience to the orders of another servant over him, and whose orders he was bound to obey, that he had a right to recover for the injury inflicted under such circumstances." See, also, Cheeney *v.* Steamship Co., 92 Ga. 726, 19 S. E. 33.

Same—Same—Liability for Negligence of Fellow Servant.

This disposes of the sixth, seventeenth, eighteenth, nineteenth, and twenty-third grounds of the motion for a new trial. Considering the requests to charge in the last grounds named in the light of the entire charge, there was no error in refusing them.

5. In the fifth ground of the motion, complaint is made that the court erred in charging the jury as follows: "It was the duty of the defendant to furnish a reasonably safe place for this man to work. It was the right of the plaintiff to assume that the place was safe when he was directed to go to it." The objection to this charge was that the overwhelming weight of evidence was to the effect that practically every place in the quarry was dangerous, and that any one working there was liable to be injured, and it was claimed that this charge was without evidence to support it. As an abstract proposition of law, the charge was correct, and we do not think that in the present case it was calculated to mislead the jury. There is evidence in the record of the dangers that necessarily attend the working of a quarry, ordinary and usual in their nature, and the jury doubtless clearly understood by the charge with reference to a reasonably safe place for a man to work that it meant such a place under the circumstances and conditions attending the operation of that business. There is testimony in behalf of plaintiff tending to establish the fact that when injured he was not in a safe place. He testified that on the day before, when engaged at work there, and when the work of removing rock above them began, plaintiff and others were ordered away from that place on account of this danger, and that he knew nothing about what was going on above him when he was hurt; and we fail to find any evidence that Elliott knew he was beneath him. We think, therefore, that this charge was warranted by the evidence.

Same—Duty to Furnish Safe Place to Work.

6. In the ninth, tenth, and eleventh grounds of the motion, complaint is made of the refusal of the court to give certain

written requests in charge, touching what powers a municipal corporation can exercise, and any powers exercised over and beyond those granted the corporation are *ultra vires*; that if the jury believed the city council of Augusta had no authority from the legislature, express or implied, or indispensable to the objects of the corporation, to conduct the quarry described in plaintiff's petition, such work would be known in law as "*ultra vires*" (that is, beyond the scope and powers of the corporation), and, to create liability on the city in a case of this kind, it is necessary that the act done which is injurious to others must be within the scope of the corporate powers as prescribed by charter or positive enactment,—in other words, it must not be *ultra vires*. We do not think there was any error in refusing these requests. In the first place, in its answer the defendant set up nothing, by way of defense, charging that the city was in the exercise of *ultra vires* powers in the operation of this quarry, either by affirmative statement, or by denial of any of the allegations in plaintiff's petition, except that in the second paragraph of its answer it simply states that it does not admit that such work was within the scope of its duty or authority. It nowhere alleges that it was *ultra vires*, and, even if it did, it should have shown by its plea the reasons why the city was acting outside of its authority, and that therefore it was not responsible for the negligence of its agents in pursuit of this particular business. Besides, we think this question is controlled by the agreed statement of facts in the brief of evidence, from which it appears that it was agreed by the parties that the tract of land where this accident occurred belonged to the Augusta Canal Company, and the right to quarry the same was conveyed to the city council of Augusta under the provisions of the act of 1849, and the city has police jurisdiction over the tract. It is admitted that this tract comes within the provisions of the act. Under the act approved December 27, 1845 (Acts 1845, p. 138 *et seq.*), of which the court will take judicial cognizance, the Augusta Canal was incorporated by the

Instructions—Municipal Corporations—Power to Operate Quarry.

legislature. By the act approved February 7, 1854 (Acts 1853–54, p. 252), which amends the act of 1849, it is provided "that the city council of Augusta may, at any time hereafter, by purchase or otherwise, lawfully acquire and enjoy all the estate, privileges and franchises heretofore granted to the Augusta Canal Company," etc. From this it will be seen that there has been full legislative sanction given to the city council of Augusta to own and operate the quarry in question, and therefore in its operation it cannot be guilty of any *ultra vires* acts.

7. In the twelfth ground of the motion complaint is made that the court failed to charge the jury as follows: "There are two general characters of duties imposed on cities,—one public or governmental, and the other private or corporate. In the performance of the public or governmental duties the city is not liable for the negligence of its agents, officers, or employees. In the performance of its private or corporate duties it is subject to the same liability as are private corporations. If, therefore, you believe from the evidence that the work in which the city was engaged when petitioner, Owens, was injured, was governmental in its nature, the city cannot be held liable, whatever was the negligence of its officers or employees." We do not think the pleadings in this case involve this issue, and what we have said above on the subject of the exercise of *ultra vires* powers by the defendant will apply to this ground, also, in the motion for a new trial. There was some evidence that rock was also being gathered for the purpose of repairing the canal, as well as the streets of the city. It is contended by counsel for defendant that in the construction and maintenance of the canal the city was engaged in performing a governmental function, and therefore it cannot be liable in damages for any negligence whatever in connection therewith; that Owens, in getting out the rock, some of which might be for use on the canal, was at work in its maintenance and construction, and therefore cannot hold the city liable for its negligence. This question

Same—Same—Evidence—Operation of Quarry—Ministerial Act.

is settled in general terms by our Political Code (section 748), which declares: "Municipal corporations are not liable for failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of their ministerial duties, they are liable." The question then in this case is whether or not, when the city of Augusta was engaged in operating this quarry, it was exercising any legislative or judicial power or whether it was engaged in the performance of mere ministerial duties. There can be no doubt about the proposition that, if the powers it was discharging were purely and exclusively of a governmental character, the city would then occupy the position as simply the agent of the general government to do things which devolved upon the general government. There is a vast difference in the decisions of different courts upon the subject of what does or what does not constitute governmental power; but, under the evidence in this case, we think there can be no question but that the operation by the city of the quarry which it owns is purely ministerial. It was held by this court in Love *v.* City of Atlanta, 95 Ga. 129, 22 S. E. 29: "The duty of keeping the streets clear of putrid and other substances offensive to the sense of smell, and which tend to imperil the public health, devolves, under the charter of the city of Atlanta, upon the board of health of that city; and the functions of this department of the city government being governmental, and not purely administrative, in their character, it follows that if, in the exercise of such functions, and in the discharge of the duties devolving upon this department thereunder, a private citizen is injured by the negligence of one of its servants in and about such work, no right of action arises against the city." That case was evidently based upon the idea that the city, in performing such duties, was in the exercise of a governmental power in administering to the general public health. It was exercising a governmental function of a corporation, and was therefore not liable. In

Fuller *v.* City of Atlanta, 66 Ga. 80, it was decided: "The power granted by charter to a municipal corporation to raise or alter the grades of streets involves a legislative act. After this has taken place, the mere construction of the work is ministerial." We think the decision in the Fuller Case controls the principle in this case. Should the city decide when a street should be opened, closed, or repaired, or when a sewer should be built, it is clearly exercising legislative or judicial functions; but when it engages in the work of opening, closing, or repairing a street, or building a sewer, and is thus engaged in the physical execution of the work, it is evidently in the discharge of duties purely of a ministerial nature. If this be true, then, clearly, where a city owns a quarry, and is under obligation to keep its streets, canals, etc., in repair from material obtained from quarries, it has as much right to operate its own quarry as it would have to purchase such material from others engaged in the business; and, while so operating, it is in the performance of work purely of a ministerial nature. It is contended that the use and operation of the canal by the city were for governmental purposes; but, even if there were anything in this contention, that cannot affect the ministerial work of operating a quarry for the purpose of supplying rocks for the canal and streets. Besides, the evidence fails to show for what purpose this canal was used, —whether to extinguish fire, to supply citizens with water for private purposes, or to carry on manufacturing industries; and therefore there is nothing in the record to authorize the court to charge the request with reference to whether the city was exercising a governmental function in the operation of this canal. As above stated, however, we cannot see how the operation of a quarry for the purposes indicated by this evidence can constitute that enterprise anything but the exercise of a ministerial function. It has no reference whatever to governmental powers contemplated by the statute. There is no question in this case but that the city of Augusta was working this quarry for legitimate purposes, to wit, to repair its streets, and to furnish material for repairing its canal.

Such work of repairs is certainly within the purposes and ends of the corporation. Now, it is not pretended that the powers and duties of Joy were conferred or defined by law,—either statute or common law. He was not a public officer, but his entire powers are conferred and duties defined by the city itself. It therefore necessarily follows that he was a mere servant or agent of the city of Augusta, and it was chargeable with the consequences of his acts within the scope of his authority. This principle is recognized and fully discussed in Wood, Mast. & S. (2d Ed.) §§ 457–460. A number of authorities are therein cited to sustain the text. See Grimes *v.* Keene, 52 N. H. 335, from which the author quotes extensively, and which is controlling upon this subject.

8. In the seventh ground of the motion, exception is taken to the following charge: "He would also be entitled to recover for his decreased capacity to work, if you find from the evidence that the injury received is permanent." The objection to this was that there was no evidence showing how much he had been earning at the time of the trial, nor was there any evidence to show that his ability to labor had been diminished. It invited the jury to enter upon an unilluminated field of damages, and put no rein upon the amount to be given, thus making the verdict excessive. Upon an examination of the evidence, we do not find that the position of counsel for plaintiff in error, that there was no evidence to show that plaintiff's ability to labor had been diminished, was sustained; for the plaintiff himself testified that his capacity to labor was diminished, that it pained him to work in the sun, and that, while he did labor after the injury, he had to do so to support his family, but that it was attended with pain. There was also evidence for defendant tending to show the character of service and labor that he performed after his injury, and it seemed about as hard and difficult as he did before he was hurt. It is true, there is no evidence as to his earnings before or after the injury. This charge we do not think authorizes the jury to have any reference to his diminished earnings,

Same—Same—Personal Injuries—Damages—Diminished Power to Labor.

but it has reference only to his diminished ability to labor. But there is authority for the position that such permanent diminution of one's power to labor constitutes an element of damages where it is the result of an injury sustained, though there may be no evidence that it had any effect upon the earnings of the injured party. See Powell v. Railroad Co., 77 Ga. 270, 3 S. E. 755, where the principle is laid down that one who has to live long in pain is more damaged than one who has to endure suffering but for a brief term. With reference to damages from pain, we quote the following from the opinion in that case: "It may be thought that the loss of ability to labor is not pain, but this is a mistake. There is no greater blessing of life than ability to labor, even though the proceeds may belong to another. It is better for happiness, as well as for virtue, to work for nothing, than to be idle. A physical injury that destroys the power of a human being to labor is one of the most serious injuries that it is possible to inflict. True, it is not to be measured by pecuniary earnings where the suit is by a married woman, for such earnings, as a general rule, belong to the husband, and the right of action for their loss is in him; but the wife herself has such an interest in her working capacity as that she can recover something for its destruction," etc. We do not see why this same principle would not apply to one whose capacity to labor has been diminished, and especially when such labor is attended with pain. We cannot, therefore, say that there was error in this charge which would necessitate a new trial, for both the petition and some of the evidence tend to show this effect of the injury received by plaintiff. As this was a question for the jury, we express no opinion thereon.

9. The eighth ground of exception, however, we think is open to serious objection. Complaint is made that the court erred in charging as follows: "So, gentlemen of the jury, if you find, under the evidence and the charge, that the plaintiff is entitled to recover, you determine what amount you will allow for the pain and suffering endured by the plaintiff. Then, the

amount of incapacity to work. Take into consideration, in determining that, what he has been making, and what he would likely have continued to make,—whether there would have been any increase in his earning capacity if this injury had not occurred, and also, as he grew older, what the natural decrease would be,—and say how much that was affected by this injury, and then allow what you believe would compensate him for that loss." The objection to this was that it was without evidence to support it; that it encouraged the jury to enlarge its verdict beyond what was proper and justified by the evidence; that it suggested for them a measure of damage, without there being any data on which to base it. We think the objection is well taken. While the petition alleges a diminished capacity to labor, it does not allege any pecuniary loss resulting to the plaintiff in consequence of the fact of diminished earnings from labor. It does not allege what he was making before the injury, nor what he has been able to make since, and there is not a particle of evidence in the record which throws any light whatever on the subject. The error consists, therefore, in opening up to the jury the right to investigate a matter with the view of increasing damages, by suggesting a measure of damages upon which they have no data whatever to base any finding. The jury found a verdict for $2,000. We express no opinion whatever about its excessiveness, even in view of the pleadings and evidence that were before them; but we cannot say, as matter of law, that they would have found that amount regardless of this charge for pain and suffering alone. We are aware of decisions repeatedly made by this and other courts that a new trial will not be granted by a reviewing court for error in a charge which works no injury to the complaining party. But it must be perfectly clear that a correction of the error would not result in a change of the verdict. Where the error might have influenced the jury, a new trial should be granted. We cannot say that this was not a close case upon its facts, and

therefore cannot say that the jury could not have been influenced by this erroneous charge. In Bazemore v. Davis, 48 Ga. 339. it was decided, "Material error having been committed by the court, a new trial will only be refused where the evidence demanded the verdict which was rendered." A number of decisions of this court could be cited sustaining the same principle, but this is unnecessary. In Furr v. Eddleman, 80 Ga. 661, 7 S. E. 167 (Syl., point 2), it was decided, "though an improper measure of damages be given in charge to the jury, if the verdict be for less than the damages, measured properly, would amount to, the finding need not be disturbed." But the damages involved in this case were necessarily, under the proof submitted to the jury, of a general nature, and cannot be accurately measured by the court upon any legal basis whatever. It is left almost entirely in the discretion of the jury to fix the amount of damages for pain and suffering, and their finding will not be interfered with, unless so excessive as to clearly indicate bias or prejudice. We, therefore, as matter of law, cannot say that the evidence in this case demanded a verdict for the amount found. For the erroneous charge hereinabove quoted, we feel constrained to grant a new trial.

10. The above covers all the questions of importance made by this record. There are a few other grounds in the motion for a new trial, relating principally to requests to charge; but, after comparing them with the charge of the court actually given, we do not think they are of sufficient merit to require discussion. The charge, as a whole, except as specified in the note just preceding, was full and fair, and covered all the important issues between the parties; and on account of the error in the charge hereinabove pointed out, only, the judgment denying the grant of a new trial is reversed. Judgment reversed. All the justices concurring.

Case at Bar.

EASTON

*v.*

BOARD OF REVIEW OF PEORIA COUNTY.

(*Supreme Court of Illinois, Dec. 18, 1899.*)

**Municipal Warrants—Taxation—Exemptions.**—A municipal warrant is not exempt from taxation as an instrument of government, but is taxable as a chose in action.

*Dan F. Raum*, for appellant.

*Edward C. Akin, Atty. Gen.* (*C. A. Hill* and *B. D. Monroe*, of counsel), for appellee.

PHILLIPS, J. On April 1, 1899, appellant was the holder of three warrants, amounting altogether to the sum of $35,000, drawn by the city of Peoria upon its treasurer, and payable out of the taxes levied and to be collected for the year 1899. These warrants were issued in pursuance of resolutions adopted by the city council, and appellant advanced the face of said warrants to the city of Peoria, to be used by it in payment of its current expenses. Each warrant provides for the payment of 5 per cent. interest, and they are made payable one year from date, so that they might be met by the taxes collected for the year 1899. Appellant claimed that the warrants were exempt from taxation, and for that reason refused to return the same to the assessor. Upon notice, he appeared before the board of review, and again claimed the exemption; but the board of review held that the warrants were taxable, and assessed appellant for the same. From this action of the board of review appellant prayed an appeal, which, under the provisions of paragraph 4 of section 35 of the revenue act of February 25, 1898, is transmitted to this court by the auditor

of public accounts, as provided by that paragraph of the section referred to.

Appellant claims that these warrants are instruments of government employed by the city of Peoria to carry into execution its powers, and cannot be presumed to be taxed, because such tax would operate injuriously upon future warrants, and destroy this instrument of government; also, because, it is claimed, the revenue acts under which these warrants are proposed to be taxed were adopted for the purpose of raising revenue for municipalities, which would be impeded or destroyed by their taxation, and to tax them would impair the obligation of contracts. The warrants drawn by the city of Peoria, a municipal corporation, represent nothing more than the promise of the municipality to pay a debt incurred by the city by reason of the advancement of money thereto. An evidence of indebtedness, under whatsoever name it may be termed, whether note, bond, bill of exchange, or other instrument, and however secured, is a mere chattel personal, included within the term "chose in action." It has never been the policy of this state to exempt from taxation choses in action, whether they include indebtedness represented by the bonds of municipalities of the state, whether county, city, township, or other municipality. By section 1 of article 9 of the constitution it is provided, "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property," etc. By section 3 of the same article the property of the state, counties, and other municipal corporations, real and personal, and certain other excepted property, is made exempt from taxation by general law. No general law exempts from taxation an indebtedness resulting from the loan of money to any such municipal corporation so mentioned in section 3, because it cannot be held that the indebtedness of a municipality is property, but the evidence of indebtedness against such municipality is a

chose in action following the domicile of the owner, representing property which is liable to taxation under the provisions of the constitution heretofore quoted. There is no principle of equity or of public policy which exempts such indebtedness from taxation. The action of the board of review of Peoria county was correct, and is approved. Action approved.

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MAYOR, ETC., OF NEWBERN

*v.*

MCCANN.

(*Supreme Court of Tennessee, June 25, 1900.*)

**Ordinance to Prevent Saloon Keeper from Entering Saloon on Sunday—Validity.**—A municipal ordinance is unreasonable and void which prohibits a saloon keeper and his employees from entering his place of business on Sunday for any purpose without a written permission from the mayor or recorder of the town.

APPEAL by the town from Dyer county circuit court. *Affirmed.*

*S. L. Cockroft*, for plaintiff in error.

*Draper & Rice*, for defendant in error.

WILKES, J. This case originated in the mayor's court of the town of Newbern, and comes to this court from the circuit court of Dyer county on the appeal of the mayor and aldermen. The defendant was fined by the mayor of Newbern $25 for the violation of an ordinance of the town. The case, on appeal to the circuit court, was tried by the court without a jury, and that court found in favor of the defendant, released him from the fine, and taxed the mayor and aldermen with the costs of the suit.

Under the act of 1887, the mayor and aldermen of Newbern are authorized to license, tax, and regulate merchants, peddlers, and all privileges taxable by the state, and are

authorized to pass all by-laws and ordinances necessary to enforce the powers granted, and have all the rights, privileges, and powers which are granted and conferred by law upon municipal corporations of a like kind in the state, and the right to impose fines is expressly named. The ordinances called in question in this case as being unwarranted by the charter and unreasonable in their provisions are as follows:

"Sec. 9. Be it further ordained that no licensed grocer or saloon keeper or other persons shall retail any malt, fermented or spirituous liquors or any intoxicating liquors on Sunday, nor shall any such person or persons keep open Sunday any place where such liquors are sold or dispensed within the corporate limits of the town of Newbern. Any person or persons violating this ordinance shall be fined not less than $25.00 nor more than $50.00."

"Sec. 12. Be it further ordained, that it shall be unlawful for the proprietor of any saloon or place where intoxicating liquors are sold or dispensed, his clerks, agents or employees to enter on Sunday for any purpose any such saloon or place where intoxicating liquors are sold or dispensed without first obtaining a written permission from the mayor or recorder of the town of Newbern, which said permission shall be reduced to writing, dated, and signed by the mayor or recorder, stating the length of time said person may remain in said saloon or place where intoxicating liquors are sold or dispensed, and shall be good and valid only for that day and for the time specified therein, and any such persons in possession of said permission shall exhibit the same to the marshal of the town on his demand, and on a refusal to do so shall subject himself to the same penalty as if he had no such permission; provided, however, that the granting of such permission shall not be so construed as to give proprietors of saloons, their agents, employees or clerks any right or authority to do or transact any kind of secular business whatever while in said place of business and acting under said permission. Any person or persons violating the provisions of this ordinance shall be fined not less than $25 nor more than $50."

Mayor, etc., of Newbern *v.* McCann

It was under this latter section that the defendant was convicted and fined, and it is the only one now brought in question. The facts were agreed upon, and are as follows: The defendant is the keeper of a saloon, and engaged in that business in Newbern as his sole and only business. He went into his saloon on Sunday, the 10th day of December, 1899, twice, unlocking and entering by his front door, the saloon being located on Main street. He remained in his saloon and place of business, where he sold and dispensed intoxicating liquors, on each occasion, five or ten minutes. There was no other person with him, and none other entered while he was in the saloon. The first visit was to get a half pint of whisky for his bartender, who was at the time sick at defendant's house, where defendant was waiting on him; and he went for and procured the whisky for the sick man at the suggestion and recommendation of Dr. Cole, a regular practicing physician, who was attending as such upon the sick man, and this was the sole and only purpose of getting the whisky out of the saloon at that time; and he did not charge for said whisky, and never intended to do so. Upon the second occasion, on the same day, he went into the saloon merely for the purpose of getting a piece of ice for the same sick man, there being no other place in the town at which it could be procured at that time, except in the saloons; and on this occasion no other person went into the saloon with him, or came in while he was there, and upon neither occasion was any other person in the saloon while he was in it; and he went in only for the purpose mentioned, and remained not longer than five or ten minutes, and the front door on each occasion was closed, except at the time he was going in or coming out. He did not on either occasion, when entering the saloon, have any written permission from the mayor of Newbern, who lived only about 100 yards from the saloon, nor from the recorder of the town (as required by the ordinance), to enter his saloon upon that particular Sunday, and defendant said that he would go into his saloon on Sunday whenever he wished to do so, and without asking permission

of any one. There can be no doubt that under its charter the town of Newbern can regulate the mode and manner in which the sale of intoxicating liquors may be made and the privilege exercised, and this embraced the power of reasonably partial or qualified prohibition. 1 Dill. Mun. Corp. (2d Ed.) § 292; Mayor, etc., v. Linck, 12 Lea 507, 514; Horr & B. Pub. Ord. § 30. Laws and ordinances enjoining the observance of the Sabbath are uniformly upheld by this court. Breyer v. State, 102 Tenn. 110, 50 S. W. 769; Judefind v. State, 78 Md. 510, 28 Atl. 405, 22 L. R. A. 721; McNeill v. State, 92 Tenn. 720, 23 S. W. 52; McKinney v. City of Nashville, 96 Tenn. 79, 81, 33 S. W. 724; Johnson v. City of Chattanooga, 97 Tenn. 248, 36 S. W. 1092. Ordinances may be passed regulating the retailing of liquors and the opening and closing of saloons, and, if they are reasonable and not oppressive, they will be maintained (Smith v. Mayor, etc., 3 Head 245; Maxwell v. Jonesboro Corp., 11 Heisk. 257; Ward v. Mayor, etc., 8 Baxt. 228), but not if unreasonable and oppressive (Grills v. Mayor, etc., 8 Baxt. 247). The objection to the ordinance in this case is that there is an absolute prohibition against the owner or employee entering the saloon on Sunday for any purpose; and, again, that permission to enter in cases of necessity or emergency is made to depend upon the consent of the mayor or recorder, and gives room for an arbitrary discrimination on the part of the authorities of the municipality. This feature of the case is presented and commented on in City of Richmond v. Dudley, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, and a large number of cases there cited; and is also forcibly commented on in Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, and Mayor, etc., v. Radecke, 49 Md. 217. We are of opinion the trial judge was correct, upon both authority and reason, in holding this ordinance invalid. It is an unreasonable ordinance which provides that a man, though he may be a saloon keeper and carry on the business of selling intoxicating liquors, may not for any reason enter his saloon or place of business on Sunday. He may be prohibited from

keeping it open, or selling any liquor, or carrying on his usual business, or winding up that already done, or letting others into the saloon. As was said in McKinney *v.* City of Nashville, 96 Tenn. 79, 33 S. W. 724: "We do not hold that the proprietor or employees or family may not enter the saloon, as proper occasion may demand, on Sunday; but they cannot engage in work pertaining to the saloon or the business, or allow others to enter it or remain in it." There are many occasions when a keeper of a saloon may enter it on Sunday from necessity or upon an emergency,—as, to guard against fire or burglary, or to protect his house from damage as the results of rains or storms, or his goods from loss from sudden leakage, and many other matters which present cases of emergency and necessity. When such occasions arise, it is unreasonable to require that the owner or employee must first find the mayor or recorder, and get his permission to enter for such purposes. This discretion given to the mayor or recorder to decide whether the case is one of necessity or emergency, and to grant or refuse the request, is one which must also vitiate the ordinance, when taken in connection with the other general and absolute prohibition. We are of opinion, therefore, that the trial judge was correct in his judgment, and it is affirmed, with costs.

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## *In re* Town of Holland *et al.*

(*Supreme Court of Wisconsin, June 2, 1900.*)

Detached Territory—Validity of Incorporation—Jurisdiction.—A village, consisting of a tract of land in a town, was incorporated by an order of the circuit court. The validity of such incorporation was attacked on the grounds that the territory incorporated did not contain the requisite population per square mile, and that a majority of the ballots cast to determine upon incorporation was not in favor of the proposition. *Held*, that the grievance complained of was merely local, and not one so "affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people" as to put in motion the original jurisdiction of the supreme court of Wisconsin.

*In re* Town of Holland

APPLICATION to proceed by *quo warranto*. *Application denied.*

*W. H. Timlin*, for petitioners.

*Simon Gillen*, for respondent.

PER CURIAM. The town of Holland, in Sheboygan county, and C. J. Huenink, a taxpayer of said town, ask leave to begin and prosecute an action in this court to test the validity of the organization and incorporation of the village of Cedar Grove. The attorney general was requested to bring such an action, but, after a hearing, declined so to do. It appears from the petition that the village of Cedar Grove, consisting of a tract of land in the town of Holland containing two square miles, all in Sheboygan county, was incorporated by an order of the circuit court on November 14, 1899. The validity of such incorporation is attacked on the ground that the territory incorporated did not contain the requisite population per square mile, and that a majority of the ballots cast at the meeting of the election to determine upon incorporation was not in favor of the proposition. The officers of the village who appear to oppose this application insist that the facts set forth in the petition are not sufficient to warrant the exercise of the original jurisdiction of this court. In Attorney General *v.* Railroad Co., 35 Wis. 425, this court announced the rule that, in all cases in which the exercise of the original jurisdiction of this court is sought, leave must be obtained of the court upon a *prima facie* showing that the case is a proper one for its cognizance. In a later consideration of the same question the conclusion arrived at was that it was not enough to put in motion the original jurisdiction of this court that the question was *publici juris*, but it should also be one "affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people," and one, also, in which the interest of the state is primary and proximate, not secondary or remote. Attorney General *v.* City of Eau Claire, 37 Wis. 400. The rules so established have been frequently reiterated, and the limits under which the original

jurisdiction of this court will be exercised so carefully defined that nothing new can be said on the question. State *v.* Baker, 38 Wis. 71; Same *v.* Milwaukee, L. S. & W. Ry. Co., 45 Wis. 579; Same *v.* St. Croix Boom Corp., 60 Wis. 565, 19 N. W. 396; Same *v.* Shaughnessey, 86 Wis. 646, 57 N. W. 1105; *In re* Hartung, 98 Wis. 140, 73 N. W. 988. The petition here presented fails to disclose facts of such wide concern as to come within the rules stated. The grievance complained of is merely local, and the circuit court has ample jurisdiction to hear and determine the controversy. The application is denied.

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CITY OF MT. STERLING

*v.*

JEPHSON.

(*Court of Appeals of Kentucky, Nov. 25, 1899.*)

**Streets—Change of Grade—Throwing Surface Water on Private Property—Liability of City.***—Under section 242 of the constitution of Kentucky a city is liable for throwing surface water on private property in lawfully opening and grading a street.

APPEAL by defendant from Montgomery county circuit court. *Affirmed.*

*A. T. Wood* and *W. B. White*, for appellant.

*Ed C. O'Rear*, *H. R. Prewitt*, and *R. A. Chiles*, for appellee.

HOBSON, J. Appellee brought this suit to recover of appellant damages to her property by reason of the negligent construction of a street on the south side of it. It appears that a new street, known as "College Street," was opened by the city. The ground over which it ran being rolling in front of appellee's property, there was a fill, and back of it

*See McCray *v.* Fairmont (W. Va.), 2 Mun. Corp. Cas. 323.

a cut, by reason of which the water falling on the hill beyond was brought through the cut, and when it reached the fill was emptied upon appellee's property. The fill preventing its escape, and no sewer being provided for the purpose, a considerable volume of water was there collected, which, it is alleged, damaged the property $2,000. A jury, to whom the case was submitted, after examining the premises fixed the damages at $1,500.

It is insisted for the city that it is not liable for changing the grade of the street, and thus throwing the surface water on appellee. We are referred to Dill. Mun. Corp. §§ 798–800, as sustaining this view; the city being authorized by law to open and grade the streets. The question of the liability of the city in such a case was determined by this court in the case of City of Henderson *v.* McClain, 43 S. W. 700, and several subsequent cases, in which it was held, under section 242 of our present constitution, that the rule stated by Dillon in the sections referred to is not in force in this state. Under these decisions, the petition in this case was sufficient, and the proof warranted the submission of the issues to the jury.

The instructions fairly submitted to the jury the material questions in the case, and, they having inspected the property under an order of court, we cannot say that their finding is so against the evidence as to warrant our setting it aside. The recovery is for the permanent injury to the property, and is in full for all damages recoverable therefor. The injury would appear to be permanent. At least, no practicable way of avoiding it being shown, the amount fixed by the jury is not, in that view, excessive. Judgment affirmed.

## CITY OF STREATOR

*v.*

## CHRISMAN.

(*Supreme Court of Illinois, Oct., 1899.*)

**Defective Sidewalk—Personal Injuries—Knowledge of City—Question for Jury.**—The evidence was sufficient to warrant the jury in finding that the defect in the sidewalk causing plaintiff's injuries had existed for a sufficient length of time, and was of such a nature, that the city could, in the exercise of reasonable diligence, have ascertained its existence and repaired the defect.

**Using Sidewalk with Knowledge of Defect.***—In an action for personal injuries caused by a defect in a sidewalk, the fact that the injured person was using the sidewalk with knowledge of the defect does not necessarily establish contributory negligence.

APPEAL by defendant from Second district appellate court. *Affirmed.*

*Charles H. Egbert*, for appellant.
*H. H. Dicus* and *McDougall & Chapman*, for appellee.

PER CURIAM. In deciding this case the appellate court delivered the following opinion:

Case Stated.

"Appellee, while walking along a street of the city of Streator, towards her home, about ten o'clock at night, on August 7, 1897, was tripped by a loose board in a sidewalk, which was stepped upon by a companion with whom she was walking, and thrown down, receiving injuries to her back, shoulder, and hand, for which she sued the city, and recovered a verdict for $1,000. A judgment was entered by the court for that amount, and the city appealed therefrom to this court.

*See Huntington *v.* Folk (Ind.), 2 Mun. Corp. Cas. 688, and *footnote*; Roanoke *v.* Shull (Va.), 2 Mun. Corp. Cas. 667.

City of Streator *v.* Chrisman

"It was shown by the evidence, and is not questioned, that the boards in the sidewalk were loose at the time and place in question, and that appellee, by reason of such defect in the walk, received a fall and suffered certain injuries. It was contended, however, that the defect had not existed for such a length of time, nor was it of such a nature, as to charge notice thereof upon the city, and most of the evidence in the case was introduced upon that question. Four witnesses, including appellee, swore positively that they passed over the walk frequently, and that the boards were loose for from two to four weeks prior to the accident. On the other hand, some eight witnesses introduced on the part of appellant testified that they had used the walk often during said time, and never noticed any loose boards; and one other witness for appellant said he noticed the loose boards on the day of the accident, but not before. None of them, however, would swear positively there were no loose boards before that time, though the section foreman who had charge of the railroad crossing at the place where the accident occurred testified that he examined the walk in question a week before the accident, and could then discover no loose boards. While the evidence is not conclusive, we think it sufficient to justify the jury in finding that the defect had existed for a sufficient length of time, and was of such a nature, that the city could, in the exercise of reasonable diligence, have ascertained the existence of the defect and repaired it.

Defective Sidewalk—Personal Injuries—Knowledge of City—Question for Jury.

It is contended that appellee knew of the defect in the walk, and was therefore guilty of contributory negligence in going upon it. Although a person passing along a sidewalk may know it is out of repair, he may, notwithstanding such knowledge, recover for a personal injury occasioned by the defective walk, if he uses ordinary and reasonable care. City of Flora *v.* Naney, 136 Ill. 45, 26 N. E. 645. Whether due care was exercised in using a sidewalk, knowing it to be out of repair, is a

Using Sidewalk with Knowledge of Defect.

question of fact for the jury. Village of Cullom *v.* Justice, 161 Ill. 372, 43 N. E. 1098.

"The instructions given on both sides fairly presented the law governing the case to the jury. We cannot say that their verdict was clearly unwarranted by the evidence, and we are therefore not disposed to disturb it. We would have been better satisfied had the damages been assessed by the jury at a smaller amount, but they are not sufficiently large to warrant a reversal on that account alone, and the judgment of the court below will be affirmed."

We concur in the foregoing views expressed by the appellate court, and in the conclusion reached by it. Accordingly the judgment of the appellate court is affirmed. Judgment affirmed.

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URTEL

*v.*

CITY OF FLINT.

(*Supreme Court of Michigan, Dec. 2, 1899.*)

**Depression in Sidewalk—Personal Injuries—Negligence—Question for Jury.***—In an action for personal injuries caused by a defective plank sidewalk, whether a depression of from two to three inches, which, when stepped on, would sink down three on four inches, and act as a trip to one unused to stepping on the plank, made the walk not reasonably safe and fit for travel, was a question for the jury.

**Same—Same—Latent Defects.***—Such depression could not, as matter of law, be said to be latent, as it could be seen from a distance of two rods, and had existed for several months prior to the accident.

**Same—Same—Contributory Negligence.**†—Plaintiff was not, as matter of law, guilty of contributory negligence in using the sidewalk with knowledge of such depression.

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*See Lincoln *v.* Perner (Neb.), 3 Mun. Corp. Cas. 233; Buckley *v.* Kansas City (Mo.), 3 Mun. Corp. Cas. 475; Devenish *v.* Spokane (Wash.), 2 *Id.* 46; Young *v.* Webb City (Mo.), 2 *Id.* 500; Jones *v.* Greensboro (N. Car.), 1 *Id.* 384; Seamons *v.* Fitts (R. I.), 1 *Id.* 454, and *notes* 474 *et seq.*

†See Streator *v.* Chrisman (Ill.), *ante* and *foot-note.*

Urtel *v.* City of Flint

ERROR by defendant to Genesee county circuit court. *Affirmed.*

*Ed. S. Lee* (*Jas. S. Parker*, of counsel), for appellant.
*Brennan & Cook*, for appellee.

MONTGOMERY, J. The plaintiff recovered a verdict and judgment for $450 for injuries sustained by stepping into a hole in a sidewalk, which, it is alleged, the defendant city allowed to become and remain in a dangerous condition.

Case Stated.

The averment as to the fault of the city is as follows: "By allowing one of the planks of said sidewalk to become broken and splintered, thereby making a depression on the surface of said walk of from four to six inches wide, and fifteen to eighteen inches in length, and about two to three inches in depth, which depression, when subjected to the weight of a person's foot and body, caused the splintered portion of said plank, to wit, the depression aboved described, to sink to the ground beneath the sidewalk, a distance of from three to four inches." There was testimony fairly tending to support the plaintiff's allegation as to the character of the defect, and also tending to show that the sidewalk in question had been in the condition described for at least two months prior to the injury to plaintiff. Defendant's counsel contend that such a depression is not a dangerous place, and is reasonably safe and fit for travel, within the meaning of the statute. The question was raised by objections to proofs under the declaration, and also by requests to charge. Counsel cite, in support of this declaration, Weisse *v.* City of Detroit, 105 Mich. 482, 63 N. W. 423, and Yotter *v.* City of Detroit, 107 Mich. 4, 64 N. W. 743. In each of the cases cited the defect alleged was a rise in the sidewalk. In the first case it was stated that the fact that the plank was not nailed down does not seem to have caused the injury. It was the same as though it had been nailed, but was 1½ to 2 inches above the other, so that the question is fairly presented whether such a rise is a defect in the walk so that it is not reasonably safe. It was

said, in disposing of the case: "If the plaintiff could recover in this case, every municipality would be compelled to exercise the most rigid care over its streets to see that no rise of two inches occurred along the line of travel over side and cross walks." The Yotter Case follows this holding. These two cases follow the holding that a rise of from two to three inches in a sidewalk is not such a defect as makes the city chargeable under the statute. The duty is thrown upon the traveler to look out for such slight variations in the walk, and it is assumed that, when properly used, no damage is likely to occur to a pedestrian traveling such a walk. This case presents a very different aspect. The defect did not consist in a slight rise in the sidewalk, but, according to the averments, the plank in question was broken so that there was a depression of from two to three inches, and which was most dangerous. When stepped on, it would sink down three or four inches, thus acting as a trip to one unused to stepping on the plank. We are satisfied that it was a fair question for the jury as to whether the walk was in a condition reasonably safe and fit for travel.

Depression in Sidewalk—Personal Injuries—Negligence—Question for Jury.

It is further contended that, as there was no evidence of direct notice to the officers of the city, the character of this depression was not such as to afford constructive notice. The defendant raised this question by a request as follows: "In this case there is no evidence of notice to the city of the defective condition of the plank in the place in the walk called the 'driveway,' where plaintiff, by his proof, claims he was injured. There is no proof of any actual notice, and the defect in the plank, as described by all the witnesses, was a latent one, not easily observed, and it was not such a defect as would be notice of itself to the city." There was testimony by numerous witnesses that this defect in the walk had existed for a number of months, and that it could be discovered at a distance of two rods. The defect could not, as matter of law, be said to

Same—Same—Latent Defects.

be latent. Menard *v.* City of Bay City, 114 Mich. 450, 72 N. W. 231.

It is also urged that, as plaintiff had previous knowledge of the hole in question, he was guilty of negligence in stepping into the hole. The question was raised by the following requests: "The plaintiff in this case knew of the defect. To go to his home, the evidence shows, he might have avoided the place by walking on the other side of the street. I charge you that he is guilty of contributory negligence, and cannot recover." This request treats personal knowledge of the defect as sufficient to bar recovery, without regard to whether the plaintiff had it in mind at the time, or to the care taken to avoid injury. The rule proposing this request is not in harmony with our previous holdings, and the request was properly refused. Lowell *v.* Watertown Tp., 58 Mich. 568, 25 N. W. 517; Sias *v.* Village of Reed City, 103 Mich. 312, 61 N. W. 502; Schwingschlegl *v.* City of Monroe, 113 Mich. 683, 72 N. W. 7. See, also, Crites *v.* City of New Richmond (Wis.), 73 N. W. 322, and cases cited.

Same—Same—Contributory Negligence.

Some complaint is made of the language used by counsel in the argument to the jury. We do not think it was of such a character as to have influenced the verdict. The judgment is affirmed, with costs. The other justices concurred.

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MAYOR, ETC., OF SANDERSVILLE

*v.*

HURST.

(*Supreme Court of Georgia, July 14, 1900.*)

**Personal Injuries—Defective Bridge on Private Property—Liability of Municipality.***—A city is not liable for injuries resulting from the

*See Sachs *v.* Sioux City (Iowa), 2 Mun. Corp. Cas. 732, and *note*, p. 737; Moffatt *v.* Kenney (Mass.), 2 Mun. Corp. Cas. 727, and *note*, p. 731.

defective condition of a bridge over a road on private property, approached by a gate, and in no way controlled by the city or open to the public. This is true although the bridge is within the corporate limits of the city.

(Syllabus by the Court.)

ERROR by defendant from Washington county superior court. *Reversed.*

*Rawlings & Hardwick*, for plaintiff in error.

*Evans & Evans*, for defendant in error.

SIMMONS, C. J. According to the charter granted in August, 1872, the corporate limits of the city of Sandersville describe a circle with a radius of one mile. The charter gives the mayor and council power to open new streets and to condemn land for this purpose. From the record it appears that there was a private plantation road running through a portion of the city, and leading into the plantation of Mr. Rawlings. The city authorities adopted as a city street a portion of this road. The portion adopted extended to within 40 or 50 yards of a bridge which had been erected by private persons over a small stream. The street accepted and adopted by the city authorities terminated at a certain cross street. The balance of the road was never adopted by the city, and the owner of the premises, which were inclosed by a fence, had erected a gate across that part of the road which had not been accepted by the city, between the bridge and the city street. Mrs. Hurst, an old lady, walked along the street and the road until she arrived at the stream. The bridge had fallen into decay, and there were but two planks over which passengers could cross. Mrs. Hurst undertook to walk over these planks, when they tilted, throwing her into the stream and breaking her ankle. She brought suit against the city, and the jury returned a verdict in her favor. A motion for a new trial was made and overruled. The city excepted.

The principal question argued here was whether the city was liable, under the facts stated, for the injuries sustained by the plaintiff. There was no evidence that the city authorities had ever accepted, by ordinance or otherwise, this part of the road on which the bridge was situated. There was no evidence that it had ever worked that part of the road, or had erected or maintained this bridge. On the contrary, the evidence showed that the city authorities had refused to recognize that part of the road as a street of the city. Application was made to them to furnish lumber to rebuild the bridge, and they refused to grant it. It also appeared that this bridge was on the private property of Mr. Rawlings, and that he had fenced it in and erected a gate near to the place where the city street terminated, and between that point and the bridge. There is nothing in the charter of the city which compels the city authorities to open and keep in repair all roads within the corporate limits. The charter leaves that question to the discretion of the municipal authorities. The evidence showed that these authorities had never received, accepted, or adopted as a street that part of the road on which the bridge was situated. Therefore the city was not bound to keep either the road or the bridge in repair, and the city cannot be held liable for injuries received by a person in consequence of the defective condition of the bridge. See Parsons *v.* Trustees, 44 Ga. 529; 2 Dill. Mun. Corp. (4th Ed.) § 1017. For the above reasons, we think the court erred in refusing a new trial. Judgment reversed. All the justices concurring.

HODGES

*v.*

CITY OF WATERLOO.

(*Supreme Court of Iowa, Oct. 20, 1899.*)

**Personal Injuries—Ice and Snow on Sidewalk—Concurring Causes.*** —Where an accumulation of ice and snow on a sidewalk, for which a municipality is responsible by reason of the length of time it has existed, and a recent coating of ice formed upon it, for which the municipality is not responsible, combine to cause the fall and injury of a pedestrian, the municipality is liable for the injury, provided it would not have occurred had not such accumulation existed.

**Sidewalks—Defects in Construction—Liability of Municipality.**—The place where plaintiff fell, and was injured, was upon an alley crossing. The sidewalk was about 14 feet wide, and from the buildings outward towards the curb the walk was practically level for a distance of 9 feet, there being a fall towards the street of about 2¼ inches in that distance. From this point to the curb, a distance of about 5 feet, the descent was about 7¼ inches. Plaintiff was upon this inclined portion of the walk when she fell, having moved aside to permit other pedestrians to pass. *Held*, that the city was liable because of the negligent construction of the sidewalk, if, by reason of such construction, it was dangerous to pedestrians, under the climatic conditions which prevail in the winter.

**Municipal Improvements—Adoption of Plan.**—The adoption of specifications for grading a sidewalk, which leave the engineer free to make the grade of the intersections different from each other, if it happens to suit his purpose to do so, is not the adoption of a plan of the work prepared by a competent engineer, such as will relieve a municipality from responsibility for defective grading.

APPEAL by plaintiff fron Blackhawk county district court. *Reversed.*

*Boies & Boies*, for appellant.

*J. E. Williams* and *Courtright & Arbuckle*, for appellee.

*See Circleville *v.* Sohn (Ohio), 1 Mun. Corp. Cas. 51, and *notes*, p. 58; Corey *v.* Ann Arbor (Mich.), 3 Mun. Corp. Cas. 720.

Hodges v. City of Waterloo

WATERMAN, J. Plaintiff's injuries were caused by a fall upon a street in defendant city. The petition charges negligence in two counts. In the first it is alleged that the accident was caused by ice which had been permitted to accumulate upon the sidewalk in a rough and uneven form, and in the second count the charge is made that such walk was negligently constructed, in that the outer 7 feet of the same, the walk being 14 feet wide, was sloped too much down to the level of the driveway of the street, the place where plaintiff fell being the paved crossing of an alleyway. The street in question was one of the leading thoroughfares in the city. There was evidence tending to show that, at the point where plaintiff fell, ice had accumulated upon the walk, and that the surface was broken, irregular, and uneven, and had been so for about a week prior to the accident. Plaintiff's fall occurred in the evening of Monday, January 18, 1897. There was evidence going to show that in crossing the alleyway she stepped upon a hummock of ice that projected above the general level some four or five inches. She says that, when her foot rested upon this raised surface, "my toes did not touch, neither did the sides of my foot."

Case Stated.

That a city is liable for injuries caused by snow and ice upon its walks, if the surface is permitted to be in an irregular, rough, and rounded condition, is well settled in this state. Huston *v.* City of Council Bluffs, 101 Iowa 33, 69 N. W. 1130. But defendant seeks to meet this point by showing that, but a day or two previous to the accident, there was a drizzling rain, which froze as it fell, covering the streets and walks with a glare of ice, and that it was this condition which caused the accident. We quote something of what defendant's counsel say on this point: "The undisputed evidence in this case shows that upon Saturday and Sunday the storm was of rain, sleet, and snow, and the ground was covered, as well as the streets, with a coating of ice from one-half inch to one inch thick. And the undisputed evidence in the case shows that immediately following the storm the weather turned suddenly cold. Can it, then, be said that the city

was negligent in failing to remove the ice and snow within a few hours after the formation thereof? There is no evidence to show whether the plaintiff slipped upon the old accumulation of ice or upon that just formed by the preceding storm. It is just as probable that one was the cause of the accident as the other. There is no evidence to show which is the cause, and, if such is the case, the plaintiff must fail, under the authorities cited. Plaintiff's evidence shows that the obstruction about which she complained, and which caused her to fall, was 'a point of ice' on or near the approach to the alley. The plaintiff argues that the natural and logical inference is that the old accumulation must have contributed to the injury. But can plaintiff say that, from the evidence in the case, it was an old accumulation of ice that caused her to fall? Can plaintiff say that the storm of Saturday, Sunday, and that day of the accident had not caused the obstruction of which she complains? If we are to observe the rule of law announced in all the cases, it is necessary for the plaintiff to show, by a preponderance of the evidence, whether it was the old accumulation of ice, of which she claims the city had notice, or the new accumulation, for which the city was in no way responsible."

If this icy projection existed before the storm and freezing weather of the 16th and 17th, then the fact that it was covered with a fresh coating of ice thereby will not tend to relieve defendant from liability. The rule is thus stated in Langhammer *v.* City of Manchester, 99 Iowa 295, 68 N. W. 688: "When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect, and the other some occurrence for which neither party is responsible, the municipality is liable, provided that the injury would not have been sustained but for such defect." In Salzer *v.* City of Milwaukee (Wis.), 73 N. W. 20, on a state of facts similar to that here involved, the court said: "The point urged against the adequacy of the complainant is that it alleges merely an icy and unsafe con-

Personal Injuries—Ice and Snow on Sidewalk—Concurring Causes.

dition of the sidewalk at the time of the accident, caused by a sudden change of weather. It is urged that defendant cannot be held responsible for the condition. It is true that for a defect of a sidewalk, which is mere iciness or slipperiness produced by natural causes, the city is not responsible; yet, when such condition concurs with a previous defect for which the city is responsible, the city is liable for damages." Many cases are cited in the opinion in support of this doctrine, the number and character of which indicate that the great weight of authority is with the rule announced. The fact, if it be such, that the jury might have had some difficulty in determining whether plaintiff's accident was caused by the irregular surface of the walk, or by its mere slippery condition, would not warrant the court in taking the issue from that body as it did, and determining the question in defendant's favor. A city is not relieved from liability for a defect in a walk which causes an injury because of an icy condition which contributes to the accident. Ford *v.* City of Des Moines, 106 Iowa 95, 75 N. W. 630. Whether the city should be held to have had constructive notice of this defect, or whether plaintiff showed freedom from contributory negligence, were, under the evidence, questions exclusively for the jury.

2. As we have already said, the place where plaintiff fell was upon an alley crossing. The walk was about 14 feet wide, and there was evidence to show that from the buildings outward towards the curb the walk was practically level for a distance of 9 feet, there being a fall towards the street of but 2¾ inches in that distance. From this point to the curb, a distance of about 5 feet, the descent was shown to be 7¼ inches. Plaintiff was upon this inclined portion of the walk when she fell, having moved aside to permit other pedestrians to pass. The claim in the second count of the petition is that it was negligence on the part of the city to construct the walk with this abrupt declivity in its surface. If, by reason of its construction, it was dangerous to pedestrians,

Sidewalks—Defects in Construction—Liability of Municipality.

under the conditions that prevail in this climate during the winter season, then the jury would have been justified in holding defendant liable upon this count (Ford *v.* City of Des Moines, *supra*; Shumway *v.* City of Burlington [Iowa], 79 N. W. 123), unless, as defendant claims, it is relieved from liability because of having adopted a plan prepared by a competent engineer, and according to which the work was done. Van Pelt *v.* City of Davenport, 42 Iowa 308, and kindred cases, lend support to this contention on defendant's part. It may well be questioned whether the burden is not upon the city, under such an issue, to show that it was not negligent in adopting the plan. Blyhl *v.* Village of Waterville (Minn.), 58 N.W. 817; Ferguson *v.* Davis Co., 57 Iowa 601, 10 N. W. 906; City of North Vernon *v.* Voegler, 103 Ind. 314–316, 2 N. E. 821. But this point we need not determine. There is no evidence that any plan was adopted. It is apparent that the defect complained of consisted in the steepness of the grade of the alley approach. The specifications adopted by defendant city for grading, paving, and curbing improvement district No. 1, which includes the alley in question, contain this provision: "The approaches connecting the streets or avenues and alleys shall be graded as directed by the engineer." It cannot be said to be the adoption of a plan when the design is left to the whim or fancy of a single individual, who is free to make the grade of the intersections different from each other, if it happens to suit his purpose to do so. This is not evidence of the adoption of a plan; it is rather an affirmative showing that no plan was approved by the city. See, as bearing on this point, Ford *v.* City of Des Moines, *supra*; 2 Dill. Mun. Corp. (3d Ed.) § 980. For the reasons given, we think this case should have gone to the jury. Reversed.

Municipal Improvements—Adoption of Plan.

## DOWNEND

*v.*

## CITY OF KANSAS CITY.

(*Supreme Court of Missouri, March 30, 1900.*)

**Streets — Dedication — Acceptance — Approval of Plat—Duty to Repair.**—Under the laws of Missouri, although a statutory dedication of land for a street vests the fee in the city, until the properly authorized city officers do some act evidencing an intention to assume jurisdiction over the same, the obligation of the city to keep it in repair as a street does not begin; and the mere approval of a plat upon which the proposed street is traced is not such an act of jurisdiction.

**Same—Same—Same—Same—Instruction.**—In an action against a city for personal injuries, based on the alleged liability of defendant for failure to keep in repair certain land which had been dedicated for a street, it was error to instruct, in substance, that although a statutory dedication, and the approval by the common council of such a plat did not of themselves impose on the city a duty to keep the proposed street in repair, the use thereof by persons living thereon, and by the public, for a length of time not stated, and the fact that it was not fenced so as to prevent persons using it, and that fencing it would inconvenience persons living and doing business on it, constituted an acceptance of it by the city, and imposed upon the city the obligation to keep it in repair.

**Same—Prescriptive Use—Duty to Repair.***—Under the laws of Missouri, although as between the owner of the land and the public, prescriptive use or public use for longer than 10 years bars the owner's right to close it up or to deny the use as a way, the public acquire no right by such use to demand that the city shall keep it in repair.

**Same—Dedication—Obligation to Repair.**—Even an acceptance of a dedication transferring title to a street in trust for the public does not impose a liability upon the city to keep the dedicated land in repair as a street. Such obligation does not attach until the city, in

*See *note*, 2 Mun. Corp. Cas. 731.

some official and appropriate manner, has invited or sanctioned its use as a street by the public.

**Same—Same—Acceptance.***—Leaving an opening to land dedicated for a street on a street and placing a light on the street at such point do not constitute an adoption of or an assumption of jurisdiction over the dedicated land as a street.

APPEAL by defendant from Jackson county circuit court. *Reversed.*

The plaintiff sues the defendant for damages for injuries sustained by her by falling on a sidewalk on what is alleged to be a public street of the city. The principal question in the case is whether it was such a public street. It is called "Twenty-Third Street," and extends from Woodland avenue westwardly for a distance of about 150 feet, at which point there is a bluff about 30 feet high, which effectually stops travel; but from the top of the bluff it extends westwardly to Highland avenue, and perhaps further. This alleged street is claimed to have become a public street in this manner: On October 5, 1880, Dudley & Cook laid out an addition to Kansas City, and the common council of the city, in pursuance to the duty devolved upon it by section 9 of article 7 of its charter (1875), approved the plat. Block 4 of this addition, as laid out on the plat, was bounded on the north by Cottage avenue, on the east by Woodland avenue, on the south by what is here claimed to be Twenty-Third street, and on the west by Henry street (now Highland avenue). No street was shown on the plat on the south, but a space 5 feet wide was left at the south end of the lots which fronted on Cottage avenue. This space is not designated on the plat as an alley, nor as dedicated to public use in any manner or for any purpose. It simply appears as 5 feet fronting on Woodland avenue, and extending along the rear of said lots westwardly for a distance of 500 feet. Thereafter, on December 22, 1885, Walter H. Holmes, who owned the property adjoining the Dudley & Cook property on the

Case Stated.

*See notes at end of case.

south, laid out an addition to the city, which he called "Mt. Evanston Addition"; and the common council of the city, likewise, under the charter provision referred to, approved the plat. This plat showed Twenty-Third street (a 30-foot street) to be dedicated as a public street. In this way, solely, it is claimed that Twenty-Third street became a public street 35 feet wide. Thereafter, in 1887, Mr. Haynes, who had become the owner of lots 22, 23, and 24 of block 4 of Dudley & Cook's addition, built two double flats on the south end of those lots, fronting them upon the alleged Twenty-Third street. Lot 24 began 50 feet west of Woodland avenue, and his property extended westwardly for 75 feet. He graded his lots, and constructed a sidewalk 4 feet wide in front of his flats. He wanted to extend the sidewalk eastwardly to Woodland avenue, but the owner of lots 25 and 26, which lay between his property and Woodland avenue, would not permit him to grade in front of his lots, because he had a barn built on these lots, which would be inaccessible if the grading was done. So Haynes built the sidewalk in front of lots 25 and 26 on the natural grade. In consequence of this manner of construction, there was a step, rise, or offset of 5 inches in height at the dividing line between lots 24 and 25. On the 23d of April, 1893, about 7 o'clock in the evening, while walking along this sidewalk, going eastwardly towards Woodland avenue, the plaintiff stumped her toe against this step on the sidewalk, and fell, and was seriously injured. Beyond Haynes' house, on the north side of the alleged Twenty-Third street, there were a pretzel factory and several barns; and on the west side of Woodland avenue, or the street south of Twenty-Third street, shown on the plat of Mt. Evanston addition, there was a grocery store. Prior to the accident the city had not accepted the dedication of the alleged Twenty-Third street, unless the approval of the plats of those two additions constitutes an acceptance, and had exercised no authority over the alleged street. In improving Woodland avenue, however, the city had left an opening into the alleged Twenty-Third street, and had placed

a light in Woodland avenue at that point. The tenants of Haynes and the operatives of the pretzel factory, and the public generally, had used the 5-foot space shown on the Dudley & Cook plat, and the 30-foot space called "Twenty-Third Street" on the Mt. Evanston plat, for about six years before the accident to the plaintiff. The city had exercised no jurisdiction over the alleged street, but, on the contrary, its officers had expressly stated that "they would not have anything to do with the street." The plaintiff had on a former trial recovered judgment against the city for $2,000, but on appeal the Kansas City court of appeals reversed that judgment (Downend *v.* Kansas City, 71 Mo. App. 529) on the ground that the approval of the plats by the common council of the city was not such an acceptance of the street by the city as imposed the duty upon the city to keep it in repair, but that the city is not responsible for injuries received upon such streets until it has assumed control over them, "or until they have become necessary to the public, and have been so used as to charge a duty on the city." On the retrial the case was submitted to the jury upon instructions that authorized a recovery by the plaintiff if the city had assumed control over this alleged street, or if it was necessary to the public, and had been used by the public as a street. There was a verdict for the plaintiff for $10,000, but the court ordered, and the plaintiff entered, a remittitur of $5,000, and judgment was accordingly entered for $5,000, from which, after proper steps, the defendant appealed.

*R. B. Middlebrook*, *H. S. Hadley*, and *L. A. Laughlin*, for appellant.

*Wm. P. Borland*, *Willard P. Hall*, and *Frank Hagerman*, for respondent.

MARSHALL, J. (after stating the facts). 1. The evidence does not clearly show whether or not the 4-foot sidewalk was built on the 5-foot space left by the Dudley & Cook plat

at the south end of block 4. As before stated, the plat shows a strip of land, marked 5 feet, fronting on Woodland avenue, and extending westwardly 50 feet, and running along the rear of the lots which front on Cottage avenue. Section 6360, Rev. St. 1879, which was in force when this plat was filed, required that when an owner laid out an addition to a city he should make out an accurate map or plat thereof, showing—First, all parcels "reserved for public purposes, by their boundaries, course and extent, whether they be intended for avenues, streets, lanes, alleys, commons or other public uses; and, second, all lots for sale, by numbers, and their precise length and width." All the lots on the plat are numbered, and their precise length and width are shown. The precise width of this 5-foot strip is stated on the plat, and its precise length is ascertainable by reference to the lots on which it abuts, but it is not numbered. So in this respect it does not comply with the plat laws then in force, so as to be treated as a lot reserved for sale. Upon the principles laid down in City of California v. Howard, 78 Mo. 88, and Buschmann v. City of St. Louis, 121 Mo. 536, 26 S. W. 687, this strip may therefore be considered as having been dedicated to public use for such purposes as it might appropriately be applied to. The parties hereto treated it as an alley until the plat of Mt. Evanston addition was filed, and because that plat showed Twenty-Third street 30 feet wide, adjoining it on the south, they have treated it as a part of Twenty-Third street, and called that a street 35 feet wide; and, as they so treated it, we shall so deal with it in this case.

2. The main contention of the plaintiff is that, when the common council of the city approved the Dudley & Cook and Mt. Evanston plats, the city thereby accepted Twenty-Third street, and became bound to keep it in repair, and therefore is liable to plaintiff for its failure so to do. The Kansas City court of appeals decided adversely to this contention when this case was before that court, and, we think, properly so decided. At the time these two plats were filed

for record, the plat laws of the state (Rev. St. 1879, c. 139) did not require the approval of such plats by municipalities, nor was it then required that the streets and alleys dedicated by such plats should conform to the existing streets of the city or town. The act of 1887 (Acts 1887, p. 227) required the approval of such plats by the common council of the city or town, and also required a conformity to ex sting streets, before they could be recorded. Prior to the passage of this act, however, the charter of Kansas City (section 9, art. 7, Charter Kansas City 1875) made it unlawful to make or file any such plat unless it was approved by the common council of that city. In State *v.* Chase, 42 Mo. App. 343, the Kansas City court of appeals held that, when an owner presented a plat to the common council for approval which conformed to the requirements of the act of 1887, the common council had only a ministerial duty to perform, and was bound to approve it, and could be compelled by *mandamus* to approve it, and that the common council had no power to add additional conditions, qualifications, or restrictions, nor could it dictate the length or width of a street or alley, since the legislature had not seen fit to require such conditions. The court construed the act of 1887 strictly, and held that the statute only required the proposed platted streets to "conform to the streets of such city, town, or village, so that the streets and avenues of such additions or plats shall, as near as may be, run parallel to, or be continuations on a straight line of, the streets of said city, town, or village, and all taxes against the property proposed to be platted shall be paid." Accordingly in that case the common council was compelled by *mandamus* to approve the plat. The sole purpose of requiring plats to be submitted to and approved by the common council of a city was to secure systematic prolongations of its streets, and thus conform to the plan upon which the city was laid out. The landowner can or cannot dedicate streets or alleys to the public. He may lay out an addition, and reserve all the ways and means provided for access to platted lots as private ways; but,

because the city has the right to condemn a private way and convert it into a public street, the city has an interest in seeing that the private ways shall, as near as may be, be prolongations of existing streets, to the end that, if they are ever condemned as public streets, there may be conformity and regularity. So, when a common council approves a plat of a proposed addition, this is the extent to which it binds itself. Such an approval is a certificate that the plat conforms to the law, but it is in no sense an acceptance of the street as a public highway; nor does it cast upon the city the duty of keeping it in repair. Such a statutory plat vests the fee to the parcels of land thereon described as intended for public use in the city (section 7313, Rev. St. 1889; section 6573, Rev. St. 1879), but neither the plat nor its approval is a present acceptance thereof by the city. As a common-law dedication is a continuous, irrevocable offer to dedicate, which the dedicator cannot retract, but which does not become a street until the properly constituted authorities do some act showing acceptance thereof (Heitz *v.* City of St. Louis, 110 Mo. 618, 19 S. W. 735; Buschmann *v.* Same, 121 Mo. 536, 26 S. W. 687), so a statutory dedication vests the fee to the street in the city; but, until the properly authorized city officers do some act evidencing an intention to assume jurisdiction over the same, the obligation of the city to keep it in repair does not begin, and consequently it is not liable for a failure to do so. And the mere approval of the plat is not such an act of jurisdiction. Meiners *v.* Same, 130 Mo., loc. cit. 284, 32 S. W. 637; Baldwin *v.* City of Springfield, 141 Mo. 205, 42 S. W. 717; Brinck *v.* Collier, 56 Mo. 166; Holmes *v.* Mayor, etc., 12 N. J. Eq. 299; 2 Greenl. Ev. § 622. It follows that the mere approval of these plats by the common council of the city did not constitute an acceptance of the streets thereon laid out by the city, nor amount to an act of jurisdiction over them, nor impose an obligation upon the city to keep them in repair; and therefore this cannot be considered a public street of the

Streets—Dedication—Acceptance—Approval of Plat—Duty to Repair.

defendant city, and the city cannot be held liable for defects existing therein.

3. The plaintiff asked, and the court gave, the following instruction: "The jury is instructed that the place where the injury complained of is alleged to have occurred was dedicated by the owners of the land for public use as a highway, and such dedication was approved by the authorities of Kansas City in accordance with law; and you are further instructed that, while such dedication and approval do not of themselves impose upon the city the duty to keep the street in repair, yet the court instructs you that if you find from the evidence that Twenty-Third street, west from Woodland to a point beyond the point where plaintiff alleges she was injured, was at the time of such alleged injury an open thoroughfare, with dwelling houses and places of business fronting thereon, and that such thoroughfare was actually used and had been used previous thereto as a public thoroughfare by those living and doing business thereon, and by people visiting and doing business with them, and by others; that there were no fences in said street, or anything to prevent free ingress and egress thereto from Woodland avenue; and that the closing of said street would inconvenience those living and doing business thereon,—then so much of it as was so used was accepted by the city as street, and the city was liable to keep the portion so used in a reasonably safe condition for travel." In a word, this instruction declares the law to be that a statutory dedication, and the approval by the common council of the plat, do not of themselves impose upon the city a duty to keep the proposed street in repair, but that the use thereof by the persons living thereon, and by the public, for a length of time not stated, and the fact that it was not fenced so as to prevent persons using it, and that fencing it would inconvenience persons living and doing business on it, constituted an acceptance of the proposed street by the city, and imposed on it the obligation to keep it in repair. Cases may be found in England holding that necessity and long use by the pub-

Same—Same—Same—Same—Instruction.

lic create a highway, and impose upon the constituted authorities an obligation to keep it in repair; and cases can be found in Missouri which hold that streets and highways may be created by prescriptive use, or by the public using them as such for a period long enough to bar the owner's right to recover under the statute of limitations. But this is, perhaps, the first case where the doctrine has been bluntly stated that by the use of what is conceded not to be a street by virtue of any act of the constituted authorities it has become a street —First, because the public has used it for a time not specified; second, because the public authorities have not fenced it up so as to prevent the public from using it; and, third, because, if the public authorities had fenced it up, it would have been inconvenient to those living on it, and their friends. Or, otherwise stated: The proper public authorities have never accepted it as a street. The public has used it for a day, a week, a year, 6 years, but not prescriptively or for 10 years. The authorities have no power over it, because they have never adopted it as a street, and, notwithstanding they had no authority to do so, they have never fenced it to prevent the public from using it. But the public authorities ought not to have fenced it up, because it would have been inconvenient to the persons living on it, and their friends, if they had fenced it. Therefore it is a public street, and the city is liable for injuries received on it because the city did not keep it in repair. It is hardly possible to seriously discuss the errors and manifest incongruities which this instruction embodies. The mere use by the public does not constitute the way a street or highway, so as to cast the burden of keeping it in repair on the public authorities. As between the owner of the land and the public, prescriptive use or public use for longer than 10 years bars the owner's right to close it up or to deny the use as a way. But the public acquire no right by such use to demand that the city shall keep it in repair; for the power to lay out, open, and establish streets is vested by the organic law of the cities in Missouri, at

Same—Prescriptive Use—Duty to Repair.

least, in the city as a political subdivision of the state, and can only be exercised by the officers and in the manner specified in the charter of the city. Our government is a democracy, but a representative democracy. The people have themselves vested the power in certain city officers to acquire streets, but the people have not reserved to themselves, nor has such power been delegated to them, the power to acquire streets by user, nor by user to cast the burden of maintenance upon the city. The owner of the land may be barred by limitation, or estopped by acts *in pais*, from claiming that the way belongs to him, but the city is not barred or estopped into accepting that as a public street which the officers authorized by its charter to speak on that subject have never accepted or treated as a street.

The plaintiff relies upon Maus *v.* City of Springfield, 101 Mo. 613, 14 S. W. 630, to support the proposition asserted in this instruction,—that mere user by the public will establish a street, and require a city to keep it in repair; and plaintiff quotes from the opinion in that case the following: "To establish the character of the locality where the injury occurred as a part of the public street, nothing more was essential than to show that it was in actual possession of the city, and open to and used by the public as a thoroughfare, at the time." To which should be added what was further said in the same connection: "This, plaintiff did. It was not necessary to prove any formal dedication or appropriation of the street." There is perhaps no case in the books which is oftener misapplied than the Maus Case, and none which is more generally misunderstood than that case. It affords no foundation whatever for the statement that mere user by the public can establish a street, and require the city to keep it in repair. No such question was before the court in the Maus Case, and therefore the court could not have decided any such proposition. The statement of facts in that case is: "The alleged defect in the street was upon the cross walk in prolongation of the sidewalk on Phelps avenue (a much-frequented thoroughfare)

at the intersection of Benton avenue." Only this; nothing more. Now, it is apparent that the court assumed that Phelps and Benton avenues were both public streets. Not only this, but neither the opinion of the court nor the briefs of counsel contain even the remotest suspicion of an intimation or suggestion that there was any issue in the case as to the street being a public street. But, even if there had been any such issue in the case, what the court said would not bear out the contention that it decided that mere user by the public, without any action by the city authorities, could establish a street so as to require the city to keep it in repair. What the court said was that it is only necessary to show "actual possession of the city," and that it was "open to and used by the public as a thoroughfare." If it was in the actual possession of the city, and open to public use, the city must have done some act evidencing an intention to accept it as a street; and therefore it was a street by virtue of the act of the city authorities, and not by virtue of user alone by the public, without any act on the part of the city. Instead of deciding that mere user by the public is enough to establish it as a street, as against the city, the Maus Case decides that, in addition to such public user, the street or way or place must be shown to be in the "actual possession" of the city. And that this was the meaning intended by BARCLAY, J., in the Maus Case is conclusively shown by his later opinion in Baldwin *v.* City of Springfield, 141 Mo., loc. cit. 212, 42 S. W. 717, where he said: "The mere dedication of a city street to public use by means of a recorded plat does not of itself render the municipality liable for negligent failure to keep the street in repair. It is necessary, further, to show that the street in question has been accepted, before that liability begins. Even an acceptance of a dedication transferring title to the street in trust for the public does not impose a liability to keep the dedicated land in repair as a street. The latter obligation does not attach until the corporation, in some official and appropriate manner, has invited

Same—Dedication—Obligation to Repair.

or sanctioned its use as a street by the public. But such sanction may be given by acts of its proper officers as well as by acts in the form of ordinances. To the extent to which the city has sanctioned the use of such land by the public as a thoroughfare may the city justly be held liable for ordinary care to maintain the thoroughfare in reasonable repair for such use." This is not only a complete refutation of the improper interpretation put upon the Maus Case, but it is directly in point in the case at bar, and decides, not only that the filing of the plats and their approval by the common council did not make Twenty-Third street a public street, but also that the use of such platted street by the general public could not give it the character of a street nor throw upon the city a duty to keep it in repair, and that it would not be a public street, and such obligation to repair would not attach, until the city, "in some official and appropriate manner, has invited or sanctioned its use as a street by the public." In the Baldwin Case the question was squarely raised, and it will be noted that it was held to be a street because the street commissioner of the city had exercised jurisdiction over it, in repairing it, and had thrown or left it open for public use. This case states the law correctly, and is in harmony with the decisions in this state and elsewhere, as is shown by the cases cited in the opinion, and also by the following cases: Brinck *v.* Collier, 56 Mo. 166; Landis *v.* Hamilton, 77 Mo., loc. cit. 563; Meiners *v.* City of St. Louis, 130 Mo., loc. cit. 284, 32 S. W. 637; Garnett *v.* City of Slater, 56 Mo. App. loc. cit. 212; Mayberry *v.* Inhabitants of Standish, 56 Me. 342 (where the public use was for 65 years); State *v.* Wilson, 42 Me. 24; Folsom *v.* Town of Underhill, 36 Vt. 579; City of Oswego *v.* Canal Co., 6 N. Y. 257; Speir *v.* Town of New Utrecht, 121 N. Y., loc. cit. 429, 24 N. E. 692: Holmes *v.* Mayor, etc., 12 N. J. Eq. 299; Trustees of Methodist Episcopal Church *v.* Mayor, etc., 33 N. J. Law 13; Gilder *v.* City of Brenham, 67 Tex. 345, 3 S. W.

309; People *v.* Commissioners of Highways of Worth Tp., 52 Ill. 498; Willey *v.* People, 36 Ill. App., loc. cit. 615. The distinction should never be lost sight of between user by the public for such a length of time as will bar the owner of the land from stopping the use, and mere user by the public when relied upon to give the land the character of a street and impose upon the city the duty to repair. As between the owner and the public, the owner can stop the use by the public at any moment before his right to do so becomes barred by limitation. But the city is in a very different position; for, up to the last minute of the last day of the tenth year of the use of the land by the public, the city has no right to stop the use, for it has no title to the land used; and on the first moment of the first day of the eleventh year it could not stop the use, on the principle contended for, because the 10-years use by the public has established it as a street or highway, and thereby cast the duty to repair upon the city. Thus, it will appear that the city would be absolutely helpless to prevent its becoming a street, and equally helpless to get rid of the duty to repair. The people would have established the street against the will of the city authorities, and perhaps at a place which would not conform to existing streets, notwithstanding the people, by the organic law of the city, had devested themselves of the power to establish streets, and had expressly vested the sole power to do so in the city, as a political corporation. This is enough to show that neither upon precedent nor principle is the contention true that mere user by the public, for any length of time, without any act of the city, of land, can impress upon it the character of a street, and thereby cast upon the city the duty to keep it in repair, or make it liable for failure to do so. It follows that the instruction above set out, given for the plaintiff, is fundamentally wrong.

The leaving by the city of an opening to Twenty-Third street on Woodland avenue cannot be regarded as an act

Notes

adopting or assuming jurisdiction over Twenty-Third street, for such openings are always left at intersections with private places, or at entrances to private premises which have driveways into them. The placing of the light on Woodland avenue at the same point must be regarded in the same way.

Same—Same—Acceptance.

This case has now been tried twice in the circuit court, once in the Kansas City court of appeals, and once in this court; and it is fair to assume that counsel who have shown such marked ability in this case have elicited all the facts that exist as to the acts of the city with respect to this street, and that no new light could be thrown on the case by another trial. Therefore, to the end that there may be an end to litigation, we hold that the plaintiff has no case against the city, and reverse the judgment of the circuit court. All concur, except ROBINSON, J., absent.

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NOTES.

**Dedication—Acceptance—Improvements and Repairs as.**—The acceptance of land dedicated as a street may be shown by proof that the city has improved and repaired it. Steele *v.* Sullivan, 70 Ala. 589; Evans *v.* Blankenship (Ariz.), 39 Pac. Rep. 812; Fairbury Union Agricultural Board *v.* Holly, 169 Ill. 10, 48 N. E. 149; Dayton *v.* Rutland, 84 Ill. 279, 25 Am. Rep 457; Rutland *v.* Dayton, 60 Ill. 58; Whitfield *v.* Horrocks, 15 Ill. App. 315; Fowler *v.* Linquist, 138 Ind. 566; Devoe *v.* Smeltzer, 86 Iowa 385; McMurray *v.* Baltimore, 54 Md. 103; Wright *v.* Tukey, 57 Mass. 290; Nichols *v.* New England F. Co., 100 Mich. 230; Shartle *v.* Minneapolis, 17 Minn. 308; Brakken *v.* Minneapolis & St. L. R. Co., 29 Minn. 41; Kaime *v.* Harty, 73 Mo. 316; State *v.* Atherton, 16 N. H. 203; Niagara Falls S. B. Co. *v.* Bachman, 4 Lans. (N. Y.) 523; Port Jervis *v.* Barrett Bridge Co., 10 N. Y. S. R. 339; Greenburg *v.* Kingston, 51 N. Y. S. R. 939; People *v.* Underhill, 144 N. Y. 316; Daffy *v.* Norwood, 3 Ohio N. P. 325; Du Bois Cem. Co. *v.* Griffin, 165 Pa. St. 81; Orrick *v.* Ft. Worth (Tex.), 32 S. W. Rep. 443; Milwaukee *v.* Davis, 6 Wis. 377.

Building an approach to, and keeping in repair for six years the land dedicated is sufficient acceptance. Evansville & T. H. R. Co. *v.* State, 149 Ind. 276, 11 Am. & Eng. R. Cas., N. S., 278.

Repairs accompanied by user are evidence of acceptance. Alvord *v.* Ashley, 17 Ill. 363.

## Notes

But where such repairs were made without authority, they are not sufficient to prove acceptance. White *v.* Bradley, 66 Me. 254.

Nor would it be sufficient if a town council declare that a certain way is a highway, and order repairs upon the same at the expense of the town, to constitute such way a public highway if the council is not the agent of the public for this purpose. Remington *v.* Millard, 1 R. I. 93; Reed *v.* Scituate, 5 Allen 139; Trustees *v.* Otis, 37 Barb. 50.

A resolution ordering that a certain street be thereafter repaired does not constitute a retrospective acceptance, where the city had not previously accepted such street in any way. Kennedy *v.* Cumberland, 65 Md. 514, 9 Atl. Rep. 234.

**Same—Same—Repairing Part as Acceptance of Whole.**—Where part of land dedicated as a street is opened and worked by the city, the whole of such street is accepted. Ashland *v.* Chicago & N. W. Ry. Co. (Wis.), 30 N. W. 1101.

A city, by accepting, building, and using a street as platted, must be regarded as accepting the whole tract platted and not merely accepting such portion of the platted district as the city chose to improve and did improve. Heitz *v.* St. Louis (Mo.), 37 Am. & Eng. Corp. Cas. 149.

Where a reference is made to one of the streets of a statutory plat in an order describing the direction of a proposed city street, and the course of such platted street is followed for a short distance, and improvements are made thereon by reason of the laying out of said city street, these facts will not constitute such an acceptance by the city of the statutory plat, or the streets contained therein, as to vest in the city the fee to the streets. Hamilton *v.* Chicago, B. & Q. R. Co., 124 Ill. 235, 19 Am. & Eng. Corp. Cas. 610.

When a person in platting property maps out streets thereon, the municipal authorities may accept them in whole or in part, and an acceptance of a part is no acceptance of the whole. Chicago *v.* Drexel (Ill.), 37 Am. & Eng. Corp. Cas. 169.

**Same—Same—Sidewalks as.**—Sidewalks and repairs and improvements generally made by the property owners in compliance with the orders of the municipal authorities show acceptance. Ford *v.* North Des Moines, 80 Iowa 626; Hague *v.* West Hoboken, 23 N. J. Eq. 354; Hill *v.* Sedalia, 64 Mo. App. 494; Byerly *v.* Anamosa, 79 Iowa 204.

See, *contra*, Irving *v.* Ford (Mich.), 32 N. W. Rep. 601, where it was held that the fact that sidewalks were ordered laid by the village authorities in front of the premises, to be built by the owners, did not constitute an acceptance.

**Same—Same—Authorizing Construction of Street Railway as Evidence of.**—The grant of a franchise by a city to a street railway to

Notes

construct a line over the land dedicated as a street is evidence of acceptance. Kansas City Milling Co. *v.* Riley, 133 Mo. 574; Golden *v.* Clinton, 54 Mo. App. 100.

But an acceptance of a strip of land indicated upon a plat of a subdivision as suitable for a street, but not designated as such, is not shown by the fact that the municipal authorities granted a petition of a private corporation for leave to construct a roadway on such strip, and immediately thereafter reconsidered the motion to grant the petition and allowed the matter to drop. Chicago *v.* Drexel (Ill.), 37 Am. & Eng. Corp. Cas. 169.

**Same—Same—Naming and Opening as.**—Ordinance naming streets and alleys and the opening and user of a part of them is sufficient acceptance. Jarvis *v.* Grafton, 44 W. Va. 453, 30 S. E. 178.

**Same—Same—Placing Policemen as.**—Acceptance may be shown at common law by the fact that the city causes police officers to patrol the street and allows public use of it as a street. City of Louisville *v.* Snow's Adm'r (Ky.), 54 S. W. 860.

**Same—Same—Laying of Sewers and Water Mains as.**—Ordinance ordering laying of sewers and water mains constitutes acceptance. Smith *v.* Buffalo, 90 Hun (N. Y.) 118; Philadelphia *v.* Thomas, 152 Pa. St. 494; Great Northern R. Co. *v.* St. Paul, 61 Minn. 1; People *v.* Lochfelm, 102 N. Y. 1.

**Same—Same—Collecting Garbage and Cleaning Street as.**—The collection of garbage and ashes from houses fronting on a private court and the maintenance of a street lamp at the alley leading thereto is not such a public use as creates a dedication of the court. Robertson *v.* Meyer (N. J.), 45 Atl. Rep. 933.

Cleaning streets for sanitary purposes merely does not show acceptance. Dodge *v.* Stacy, 39 Vt. 558; De Grilleau *v.* Frawley, 48 La. Ann. 184.

But ordering the cleaning up of a plaza, shows acceptance. Evans *v.* Blankenship (Ariz.), 39 Pac. Rep. 812.

**Same—Same—Indictment for Obstructing.**—The indictment of a person for obstructing a street does not constitute acceptance. People *v.* Beaubien, 2 Doug. (Mich.) 256; State *v.* Carver, 5 Strobh. L. (S. Car.) 217.

**Same—Same—Suit to Recover Lands as Proof of.**—Acceptance is not shown by a suit to recover lands claimed to have been dedicated. State Hist. Ass'n *v.* Lincoln, 14 Neb. 336.

But in Atlantic City *v.* Groff (N. J.), 45 Atl. Rep. 916, it was held that a sufficient acceptance was shown by the bringing of an action by the city to obtain possession of the land for it to use when it should see fit.

CITY OF ATLANTA *et al.*

*v.*

STEIN.

(*Supreme Court of Georgia, Aug. 9, 1900.*)

**Letting Contracts for Public Work—Monopolies—Validity of Ordinance.**—A municipal corporation, though not required by its charter to let contracts for public work to the lowest bidders, and though clothed, as to such matters, with the broadest discretionary powers, has no authority to adopt an ordinance prescribing that all work of a designated kind shall be given exclusively to persons of a specified class. Such an ordinance is *ultra vires* and illegal, because it tends to encourage monopoly and defeat competition, and all contracts made in pursuance thereof are void.

(Syllabus by the Court.)

ERROR by defendants from Fulton county superior court. *Affirmed.*

*J. A. Anderson*, *J. T. Pendleton*, *Lumpkin & Colquitt*, and *C. T. Ladson*, for plaintiffs in error.

*C. W. Smith* and *Arminius Wright*, for defendant in error.

LUMPKIN, P. J. The mayor and general council of the city of Atlanta adopted the following ordinance:

"An ordinance requiring the union label of the Allied Printing Trades Council on all city printing.

"Section 1. Be it ordained by the mayor and general council that all printing, of whatever character, used for or by the city of Atlanta, shall bear the Allied Printing Trades Council union label of Atlanta, Georgia, as registered with the secretary of state.

"Sec. 2. Each and every city official when advertising for bids for printed matter shall specifically state in said advertisement and shall notify bidders that all bids shall be made in accordance with this ordinance.

"Sec. 3. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed."

This ordinance went into effect March 9, 1900. In obedience to its requirements, the city comptroller made a contract with the Pease Printing Company, a member of the union, to do certain printing at an agreed price. Stein, a citizen and taxpayer of Atlanta, filed an equitable petition to enjoin the municipal authorities and the Pease Company from carrying this contract into effect, and the former from further enforcing the ordinance mentioned. At the hearing it appeared that there were in the city four union and fifteen nonunion printing establishments, and that the comptroller, solely because of this ordinance, refused to entertain bids for printing from the proprietors of any of the latter. The evidence was conflicting as to the value of the work embraced in the contract with the Pease Company, but the preponderance of it was to the effect that it was worth less than the price to be paid that company; and that the city, if the nonunion printers had been allowed to compete for it, could have made a more advantageous contract. The charter of the city does not require the mayor and general council to let contracts for public work to the lowest bidders, but, under its provisions, the municipal authorities are, as to such matters, invested with a wide discretion. The injunction was granted, and the defendants excepted. As the contract was made strictly in pursuance of the ordinance, the validity of the former depends upon that of the latter. If, therefore, the ordinance was void, and it was right to enjoin the further enforcement of it, there was certainly no error in preventing by injunction the consummation of the contract. The fall of the ordinance necessarily carries with it the agreement, which had no other source of vitality. In our judgment, the ordinance was void, and the injunction was properly granted. It cannot be seriously denied that the ordinance tended to defeat competition and encourage monopoly. Indeed, the evidence introduced before the trial judge fully warranted a finding that such was not only the

tendency, but the actual effect, of the ordinance. It is not within the power of municipal authorities to enact legislation of this kind. On the contrary, with all respect to the members of the city council, we are constrained to hold that so doing is an unwarranted act, which calls for judicial interference. We cannot agree with the able and distinguished counsel for the city that "the ordinance attacked and enjoined below amounted only to a direction by the mayor and general council to the ministerial officers of the city to place the orders for public printing with printers using a union label." This ordinance is something more than a mere "direction." It has the form, and was intended to have the effect, of law; and, if valid, would, until repealed, bind the members of council as much as it would the subordinate officials of the city. These members could not, with propriety, disregard it so long as they permitted it to stand upon the municipal statute book; and the mere power to repeal it certainly did not prevent its operation on all concerned. If, in the absence of such an ordinance, the contract in question had been let to the Pease Company, it could not properly be said that the making of it was an abuse of discretion on the sole ground that the price of the work was too high. It would require an extreme case to justify the courts in setting aside a municipal contract on such a ground, when made under a charter like that of Atlanta. With respect to agreeing on prices, securing good work, prompt service, etc., the municipal discretion must and should be allowed a wide scope; and, when exercised, the courts should be exceedingly slow and reluctant to interfere. Certainly, they should never undertake to substitute their judgment, in matters of judgment, for that of the city's governing authorities.

This court, in Semmes *v.* Mayor, etc., 19 Ga. 471, held that "a body corporate is not answerable for an erroneous exercise of a discretion, though the consequences be injurious," and that "inadequacy of price, unless so great as, of itself, to be evidence of fraud, is not a sufficient ground for

impeaching" a contract for the sale of property belonging to a city. In Wells *v.* Mayor, etc., 43 Ga. 67, it was decided that, where a municipal corporation is acting within the scope of its powers, a court will not "interfere to restrain or control its action on the ground that the same is unwise or extravagant," and that, "to sustain such interference, it must appear either that the act is *ultra vires*, or fraudulent, or corrupt." Again, in Danielly *v.* Cabaniss, 52 Ga. 212, it was ruled that "when a town council is authorized by law to do a particular act at its discretion, the courts will not control this discretion, and inquire into the propriety, economy, and general wisdom of the undertaking, or into the details of the manner adopted to carry the project into execution." The case of Mayor, etc., *v.* Eldridge, 64 Ga. 524, is on the same line, and there are many others in which this court has made decisions of similar import. The doctrine of all these cases, *viz.* that, as a general rule, there should be no judicial interference with the exercise by municipal bodies of the discretion with which they are by law invested, is sound and well recognized; but this rule is not absolutely without exception. The whole subject was given thorough consideration in the case of City of Atlanta *v.* Holliday, 96 Ga. 546, 23 S. E. 509, in which, after stating that "under the charter of the city of Atlanta the discretion of its municipal authorities, within the sphere of their powers, is very broad, and this discretion is to be exercised according to the judgment of the corporate authorities as to the necessity or expediency of any given measure," it was held that: "Where these authorities are acting within the scope of their duties, and exercising a discretionary power, the courts are not warranted in interfering, unless fraud or corruption is shown, or the power or discretion is being manifestly abused to the oppression of the citizen. In a case where it clearly appears that a threatened act on the part of the municipal authorities will result in such oppression, a court of equity may interfere to prevent the wrong." The vice of the ordinance now under consideration is that it cuts

off the power to fully and freely exercise that very discretion which the public good requires the mayor and general council to exercise in making contracts. It effectually ties their hands, and prevents their availing themselves of opportunities to make advantageous agreements in behalf of the city which it is idle to say would not be presented were this ordinance out of the way. We cannot, therefore, escape the conclusion that in adopting this ordinance the mayor and general council exceeded their authority. In 1 Spell. Extr. Relief, § 718, it is said: "Where no conditions or restrictions are imposed upon municipal officers in the matter of letting contracts, they are not obliged to let the work to the lowest bidder, and cannot be enjoined for a refusal to do so, unless guilty of fraud. They may exercise an unlimited discretion so long as they are not guilty of gross abuse of discretion, and do not pervert their powers to such an extent as to amount to a fraudulent misappropriation of the public funds." It is interesting, in this connection, to notice the case of Avery *v.* Job, 25 Or. 512, 36 Pac. 293, in which it was ruled that: "Although the purchase or erection of certain public improvements may have been by the municipal charter confided to the judgment and discretion of the city council, yet equity will, at the suit of taxpayers, restrain the council from proceeding in the matter when it is not exercising its discretion, but is arbitrarily wasting the public funds, since such conduct is a gross and manifest abuse of power amounting to a legal fraud on the taxpayers." Here, then, we have most respectable authority for the proposition that a municipal act which amounts to a refusal to exercise discretion, and which must result in an arbitrary waste of the public funds, "is a gross and manifest abuse of power amounting to a legal fraud on the taxpayers." Is not such waste sure to occur when out of nineteen printing concerns in Atlanta only four are allowed to compete for the city's work, and would not a combination of these four (which could most probably be effected without much difficulty) certainly create a monopoly? If the four should combine, there would be no competition whatever. It was urged in the

argument that, if such a thing should occur, the ordinance could and would be speedily repealed. To this we reply that the combination might be made without the knowledge of the municipal authorities; but, aside from this, they ought at all times to be in a position to meet such an emergency without being compelled to resort to further legislation; and, further, whether such a combination is to be anticipated or not, they have no more right to restrict competition than to defeat it altogether.

The case of Adams *v.* Brenan, 177 Ill. 19, 52 N. E. 314, 42 L. R. A. 718, is in many respects similar to the one in hand. It was there held that "a board of education has no power to agree with the representatives of labor organizations to insert in all its contracts for work upon school buildings a provision that none but union men should be employed in such work, or placed upon its pay rolls." We make two pertinent extracts from the opinion of MR. JUSTICE CARTWRIGHT: "It is plain that the rule adopted by the board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition, and to increase the cost of work. It is unquestionable that, if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should, by a statute, undertake to require this board, as the agency of the state in the management of school affairs in the city of Chicago, to adopt such a rule, or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void, as in conflict with the constitution of the state. If such a restriction were sought to be enforced by any law of the state, it would constitute an infringement upon the constitutional rights of citizens, so that the state in its sovereign capacity, through its legislature, could not enact such a provision." Pages 199, 200, 177 Ill., page 316, 52 N. E., and page 720, 42 L. R. A. "There is another ground upon which complainant has an undoubted right to maintain the bill, and that is

that the contract tends to create a monopoly, and to restrict competition in bidding for work. The board of education may stipulate for the quality of material to be furnished and the degree of skill required in workmanship, but a provision that the work shall only be done by certain persons or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to lessen competition by preventing contractors from employing any except certain persons, and by excluding therefrom all others engaged in the same work; and such a provision is illegal and void. A taxpayer may resist an attempted appropriation of his money in execution of such a contract." Pages 201, 202, 177 Ill., page 316, 52 N. E., and page 721, 42 L. R. A. In Holden *v.* City of Alton, 179 Ill. 318, 53 N. E. 556, which was a case of identically the same kind as ours, except that there the city charter required the contracts to be let to the lowest bidders, it was decided that an ordinance like the one now under review was "illegal, as tending to create a monopoly, and impose an additional burden on taxpayers." While, of course, the provision as to letting contracts to the lowest bidders was a matter of consequence, an examination of the opinion, which was delivered by the same justice from whom we quoted above, will leave little room for doubting that the decision would and ought to have been the same, even in the absence of such a provision.

There are, besides the foregoing, numerous other authorities which support our conclusion in the present case. We cite, as more or less in point, the following: Beach, Monop. § 125; 2 Beach, Inj. § 1299; City of Chicago *v.* Rumpff, 45 Ill. 90; Littler *v.* Jayne, 124 Ill. 123, 16 N. E. 374; Association *v.* Topeka, 20 Wall. 655, 22 L. Ed. 455; Railroad Co. *v.* Smith, 29 Ohio St. 292; Van Reipen *v.* City of Jersey City, 58 N. J. Law 262, 33 Atl. 740; Oakley *v.* City of Atlantic City (N. J. Sup.), 44 Atl. 651; Winkler *v.* Summers (Sup.), 5 N. Y. Supp. 723. Most of the authorities cited in this opinion are also pertinent upon the propo-

sition that in a case like the present the taxpayer has the right to invoke an injunction. Our case of Peeples *v.* Byrd, 98 Ga. 688, 25 S. E. 677, relied on by counsel for the plaintiffs in error, is in entire accord with what we now decide. There the supreme court reporter was in fact exercising a discretion. Here the corporate authorities sought to put themselves in a place where they could not do so at all, or else within very narrow limits. Judgment affirmed. All the justices concurring.

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## MICHIGAN TEL. CO.

*v.*

## CITY OF ST. JOSEPH.

(*Supreme Court of Michigan, Oct. 17, 1899.*)

**Regulations for Use of Streets—Province of Court.**—Courts may compel municipalities to make reasonable regulations in regard to the use of their streets and decide as to their validity when made, but the establishment of such regulations is a legislative, and not a judicial, function.

**Telephones and Telegraphs—Use of City Streets—Alienation of Franchise.**—Under 3 How. Ann. St. of Michigan, § 4904e, a telephone and telegraph company, having the permission of a city to construct and operate its system in the streets of the municipality may, without the consent of the city, alienate such franchise to another company organized under another act to carry on a similar business.

**Same—Same—Revocation of Franchise—Obligations of Contract.***—A city, although having, under its police power, authority to make all reasonable rules and regulations for the erection and maintenance of poles and wires for telegraph and telephone companies, after it has granted to such a company the privilege of constructing and operating a system in its streets, and the company has incurred expense in exercising such right, has no right to impair the obligations of its contract with the company by practically prohibiting it the use of the streets for its system; and the rule is the same where the franchise is duly obtained by purchase from another company.

*See notes at end of case.

Michigan Telephone Co. *v.* City of St. Joseph

**Village Incorporated as City—Existing Franchises.**—Where a village becomes incorporated as a city, which succeeds to its rights, the city is in fact the same body politic as the village, in regard to the latter's obligations under a contract with a telegraph company for the use of the streets.

CROSS appeal from Berrien county circuit court. *Affirmed.*

The averments of the bill of complaint are substantially as follows: Complainant is a corporation organized under Act No. 129, Pub. Acts 1883 (3 How. Ann. St. c. 102a, § 3718a).

Case Stated.

Its principal office is in Detroit. It carries on in the city of St. Joseph and other cities and towns in the state the construction, maintenance, and operation of telephone lines and exchanges, and connects with the lines of other companies without the state. It has in this state about 460 toll stations and exchanges, 3,660 miles of lines, and 6,550 miles of telephone wire, besides several hundreds of miles of pole lines and wires used in the operation of local exchanges. April 4, 1881, the Telephone & Telegraph Construction Company, a corporation engaged in the telephone business in this state, presented a petition to the common council of the village of St. Joseph for permission to construct, maintain, and operate such a system in said village. Permission was duly granted, and that company proceeded at large expense to erect poles and stretch wires within the lines of the streets and alleys of said village until June 5, 1891, when said village became incorporated as a city. Complainant duly acquired by purchase all the property, rights, and privileges of said construction company. It has since continued to do business in said city, and has furnished to said city two telephones free of charge, and four others at rates below the usual charges. It has permitted said city to occupy certain poles with its fire-alarm wires without charge. August 3, 1897, complainant erected in a good and workmanlike manner, and in accordance with the terms of the statute, certain poles in said city for the purpose of connecting with its central office the premises of persons who had subscribed for telephone service.

August 3, 1897, the common council passed a resolution declaring said poles and wires a nuisance, and instructed the street commissioner to forthwith remove them; and they adopted a resolution providing that if complainant thereafter should place any telephone poles in any streets or alleys of the city without first having obtained permission, said commissioner should forthwith remove them. The commissioner did remove the poles and wires so erected. After this action was taken, complainant, on August 10th and 18th, presented two petitions to the common council, asking permission to erect poles in certain specified streets and alleys. The council refused to grant permission, and permitted a rival company, known as the Twin City Telephone Company, engaged in the same business, to set up poles and string its wires in the streets and alleys of the city. Complainant was willing and anxious to conform to all reasonable and valid regulations with reference to the placing of its poles and stringing of its wires, and so stated in said petitions. The erection of these poles and wires is essential to enable complainant to do its business and meet the requirements of its subscribers. There is ample space on the streets, and no public necessity justifies the refusal. Under the act authorizing its incorporation, complainant has power to construct and maintain lines of wire, with the necessary erections and fixtures for use in transmitting messages, along, over, across, or under any public places, streets, and highways in the state. Alleges its duties to receive and transmit messages without discrimination, and to furnish service without unreasonable delay. By the acceptance of the resolution of 1881, and the construction and maintenance of its telephone system, and by the granting of special rates and privileges to the city, a valid contract has been created between the parties, by virtue of which the city is estopped from denying the complainant's right to maintain and use existing poles and wires, and to continue to set poles and string wires over, on, and in the streets and alleys of the city. It alleges that the action of the council (1) deprives complainant of its vested rights;

(2) impairs the obligation of a contract; (3) deprives it of property without due process of law, and denies to it the equal protection of the laws; (4) operates as a regulation of commerce among the states; (5) will produce irreparable injury. The relief asked is an injunction to restrain defendant from removing or interfering with complainant's poles and wires, and from interfering with the replacing of the poles already removed and with the erection of new ones. The answer denies some of the allegations of the bill, and sets up new matter in defense. It does not, however, dispute the substantial and material allegations of the bill. It admits the removal of the poles, and the refusal to act upon the petitions of August 10th and 16th. It defends under an ordinance passed June 8, 1897, by which it was enacted that "no telegraph or telephone poles shall be located or erected on any street, alley, or public place in said city, and any such pole now erected shall not be taken up and again erected, without the consent of the city council." It sets up the ordinance granting a franchise to the Twin City Telephone Company, and states "that it has no doubt whatever that, if the complainant should ask for a similar franchise at the hands of the city council, the same would be granted." Issue was duly framed, and the case heard in open court. September 21, 1898, the court made an order holding that the common council had the right to provide reasonable rules and regulations by which the complainant should be governed in the extention of its lines; that the council had no authority to arbitrarily prohibit complainant from erecting poles and wires upon the streets and alleys; that the reasonableness of such rules or regulations was subject to the review of the court; that, unless said council should within 30 days pass and enact rules and regulations by which complainant was to be governed in the extention of its lines, the writ of injunction should issue, prohibiting the defendant from interfering with the complainant in erecting its poles or placing its wires. The order further required that, before extending its liens, complainant should present to the court a

statement of the manner in which it proposed to proceed with such extention, and prohibited complainant from proceeding except under such reasonable rules and regulations as the court shall deem necessary for the public safety and convenience. On November 11th following, a formal decree was entered substantially the same as the order above recited. From this decree both parties appeal. Complainant attacks only so much of the decree as provides that the court shall establish the reasonable rules and regulations. The defendant attacks the decree in its entirety.

*Wells, Angell, Boynton & McMillan* (*N. A. Hamilton*, of counsel), for complainant.

*James O'Hara* (*Lawrence C. Fyfe* and *O'Hara & O'Hara*, of counsel), for defendant.

GRANT, C. J. (after stating the facts). 1. It is conceded by the learned counsel for both parties that that part of the decree by which the court assumed the right to establish reasonable rules and regulations is void. This is a legislative or administrative function, and not a judicial one. The court has power to put the proper authorities in the defendant city in motion to adopt reasonable rules and regulations, and to pass upon the validity of such action when taken. This is the extent of its authority. Houseman *v.* Judge, 58 Mich. 364, 25 N. W. 369; City of Manistee *v.* Harley, 79 Mich. 238, 44 N. W. 603. Other courts recognize the same rule. Reagan *v.* Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047; Appeal of Norwalk St. Ry. Co., 69 Conn. 576, 37 Atl. 1080, and 38 Atl. 708; Nebraska Tel. Co. *v.* State (Neb.), 76 N. W. 171.

Regulations for Use of Streets—Province of Court.

It is urged that the permission granted to the Telephone & Telegraph Construction Company was personal to that company, andcould not be alienated without the consent of the city. That company was organized under a general law of the state, and derived its powers and obligations from that law. The only power which a city could have exercised over it was that of regulation. This is also true of the complainant.

Telephones and Telegraphs—Use of City Streets—Alienation of Franchise.

The transfer was made August 31, 1895, was recognized as valid by the city, and has been acted upon by both the city and the complainant since that time; the latter having expended large sums of money upon its business and improvements. Whether the city is now in position to question the validity of this transfer is at least debatable, but, as it is not argued by counsel, we refrain from discussing it. Counsel for the defendant cite in support of their contention 25 Am. & Eng. Enc. Law, 751, where it is stated "that the grant of a franchise, public in nature, like that of a telegraph company, is personal to the grantee, and cannot be alienated except by consent of the granting power. Therefore a telegraph company has no power, in the absence of special authority, to alienate the privileges granted to it by the federal or state government, and an agreement to transfer such privileges is *ultra vires* and void." The compiler cites, to sustain the text, U. S. *v.* W. U. Tel. Co., 50 Fed. 28, and W. U. Tel. Co. *v.* Union Pac. Ry. Co., 1 McCrary 581, 3 Fed. 721. The general power of alienation was not discussed in the former case, nor was it raised. The conclusion reached was based upon the language of the act of congress authorizing the construction of the original Union Pacific Railroad. The company sought to transfer its telegraph line, and to avoid its duty to maintain it. It was noted as a significant fact that the words "railroad and telegraph" were used in connection 38 times in the act. The railroad company was not seeking to transfer all its property, rights, and privileges to a successor who would be obligated to perform all the duties imposed by the act of congress, but was seeking to carve up its franchise and transfer a part of it to another corporation. The duty of the railroad company to maintain a telegraph was held to be personal. The same principle was approved in W. U. Tel. Co. *v.* Union Pac. Ry. Co. We are also cited to Crosw. Electricity, § 158, which reads as follows: "A grant to a telephone, telegraph, electric light, or railway company of the power to use the streets, highways, and post roads for the stringing of its wires and the setting

of its poles contains so much of an element of personal obligation, that such a grant is not assignable unless such a power of assignment is expressed in the language of the grant, or in some general legislation affecting the subject." The same authorities are there cited to sustain the proposition as were cited in the encyclopedia, and in addition Atlantic & P. Tel. Co. *v.* Union Pac. Ry. Co., 1 Fed. 745. That case involved the same act as the others. The last clause of the above section reads, "If the grant is in terms to X., his successors and assigns, or similar language, it is assignable," and cites Atkinson *v.* Railway Co., 113 N. C. 581, 18 S. E. 254; Toledo Consol. St. Ry. Co. *v.* Toledo St. Ry. Co., 6 Ohio Cir. Ct. R. 362; California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398; Newman *v.* Village of Avondale, 31 Wkly. Law Bul. 123. In Atkinson *v.* Railway Co. the question is not raised or discussed. The case was disposed of upon a demurrer to the bill of complaint which set up that complainant had obtained a license from the city to build a street railway; that he had assigned it in escrow to one M., who, in breach of the trust reposed in him, assigned it to the defendant corporation. The right of sale and transfer of all the property of the corporation is not alluded to in the decision. In the Ohio case the contest was between two street railways, the question being as to the right of one company to use the tracks of another. I do not find that the power to sell and transfer is even referred to in the case. In the California case the question is neither raised nor discussed. The sale there made was opposed upon other grounds. Page 428. The case of Newman *v.* Village of Avondale I have been unable to find. If defendant's contention be true, a mortgage of the property and franchise of these corporations would be void. The mortgage and bonds would be valueless unless there was a right to foreclose, sell, and convey to another party a valid title to the property. In Detroit *v.* Mutual Gaslight Co., 43 Mich. 594, 5 N. W. 1039, the grant was to the corporation, or rather to the corporators or their assigns, who were to organize a corporation. The ordinance

was silent upon the right of alienation, yet the sale of its entire property was held valid. It is immaterial that the construction company was not organized under the same act as was the complainant. It was organized under another act, empowering such companies to carry on the like business; and one of its objects declared in its articles of association was the purpose of erecting and operating telegraph lines, etc., in the cities and towns of the state. The public was not concerned in the transfer to another corporation. It suffered no injury. The assignee was subject to the same control and obligated to the same duties as was its assignor. JUSTICE CHRISTIANCY, in Joy *v.* Road Co., 11 Mich. 164, asserted the right of corporations to dispose of their property by absolute sale or mortgage in payment of their debts, unless such right is limited by some express provision or just implication of a statute, or by the general policy of the state, to be deduced from its legislation. In this opinion CHIEF JUSTICE MARTIN concurred. The other justices held the mortgage in that case valid under the statute, but reserved their opinions as to the general power of such corporations to mortgage. But, whatever may be the common-law rule, the statute puts the question at rest, and expressly authorizes corporations to alienate their property. 3 How. Ann. St. § 4904e. The sale, therefore, to the complainant was valid.

3. When the construction company and the complainant accepted the privileges granted to them by the laws of the state, and the municipality had duly given its permission, and the corporations had expended their money in valuable improvements, contracts were entered into which neither the state nor the municipality could impair or destroy, in the absence of power to do so being reserved in the grant itself, or in the constitution, which becomes a part of all such contracts. The constitution and the statute clothe municipalities with power to control their streets and alleys and protect them from things injurious and dangerous to the public; hence they have the power to make all reason-

Same—Same—Revocation of Franchise—Obligations of Contract.

able rules and regulations for the erection and maintenance of poles and wires for telegraph and telephone companies. Here its power in the matter ceases. Detroit *v.* Mutual Gaslight Co., *supra*; Grand Rapids *v.* Grand Rapids Hydraulic Co., 66 Mich. 606, 33 N. W. 749; City of Saginaw *v.* Swift Electric Light Co., 113 Mich. 660, 72 N. W. 6; Baltimore Trust & Guarantee Co *v.* Mayor, etc., of City of Baltimore, 64 Fed. 159; City of New Orleans *v.* Great Southern Telephone & Telegraph Co., 40 La. Ann. 41, 3 South. 533; City of Quincy *v.* Bull, 106 Ill. 337; Hudson Tel. Co. *v.* Jersey City, 49 N. J. Law 303, 8 Atl. 123, 16 Am. & Eng. Corp. Cas. 289; Town of Arcata *v.* Arcata & M. R. R. Co., 92 Cal. 639, 28 Pac. 676. Since the argument, counsel for defendant have called our attention to the recent case of City of Richmond *v.* Southern Bell Telephone & Telegraph Co. (decided in the supreme court of the United States in May last), 19 Sup. Ct. 778. The company in that case was acting under a law of congress, and claimed the right under the act of congress to use the streets without interference by the city authorities. The circuit court of appeals held that the rights and privileges granted by the act of congress were subject to the lawful exercise of the police power belonging to the state or its municipalities. This holding was affirmed by the supreme court. That case is no authority for the action of the common council in the case before us. The city of Richmond had, through its common council, adopted an ordinance prescribing the terms under which the telephone company might use its streets. The reasonableness of that order was not questioned. The question is not, as counsel for the defendant state, the right to regulate the use of its public streets. This right is conceded by the complainant, and in the petitions it presented to its common council. The action of the council is practically prohibitive of the use of the streets. The defendant city by its act of incorporation obtained no other or greater rights or control over the complainant than the village had over it and its assignor. Both,

Village Incorporated as City—Existing Franchise.

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under the police power inherent in municipalities, possessed the right of reasonable regulation. The city succeeded to the rights of the village of St. Joseph, and was in fact the same body politic. Grand Rapids *v.* Grand Rapids Hydraulic Co., *supra.*

In reason and authority, it was the clear duty of the defendant to act upon the petitions presented to its common council by the complainant, and to establish reasonable rules and regulations for the erection of poles and the stretching of wires. The decree in this respect is affirmed. Decree will be entered in this court in accordance with this opinion, and the defendant given 30 days after service upon its mayor of a certified copy of the decree to adopt rules and regulations in accordance therewith. Complainant will recover the costs of both courts. The other justices concurred.

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NOTES.

**Right to Revoke, Alter or Amend Charter or Franchise—Power of City.**—A valid ordinance granting the right to build and operate a street railway, after the acceptance and expenditure of large sums of money in constructing the road, constitutes a contract, which is protected by the provision of U. S. Const. forbidding laws impairing the obligation of contracts. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518; Citizens' St. R. Co. *v.* City R. Co., 56 Fed. Rep. 746; Western P. & S. Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. Rep. 188, 28 N. E. Rep. 88, 46 Am. & Eng. R. Cas. 176; Clarksburg Electric Light Co. *v.* City of Clarksburg (W. Va.), 35 S. E. Rep. 994.

When the right to use a street is acquired pursuant to a statute and under a license from the municipality, it is in the nature of a contract right, and the municipality itself cannot destroy or materially impair it. The courts must decide all controversies in which such rights are involved. Williams *v.* Citizens' R. Co., 130 Ind. 71, 30 Am. St. Rep. 201.

Where a city council, having the power, grants a franchise to a company to use the streets of a city, and such grant is duly accepted and acted upon, it becomes a vested right, which, in the absence of a constitutional prohibition of the granting of such franchises, cannot be subsequently impaired by the city authorities. Mayor, etc., of Houston *v.* Houston City St. R. Co., 83 Tex. 548, 50 Am. & Eng. R. Cas. 380, 19 S. W. Rep. 127.

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When an electric light company has received from a municipal corporation the right to erect its poles on certain streets, and, relying upon the license thus given, has expended money in establishing its plant and appliances, the city cannot, by subsequent ordinance, infringe the rights thus vested or bestow upon another the authority to infringe them. Rutland E. L. Co. *v.* Marble City E. L. Co., 65 Vt. 377, 36 Am. Rep. 868.

**Same—Same—When Franchise "A Law".**—And where a legislature confers upon a city the power, by contract, when approved by ordinance, to grant franchises to street-car companies, the exercise of this power, with the approval of the city by ordinance, is "a law" within the meaning of the above provision of the federal constitution. Wright *v.* Nagle, 101 U. S. 791; Citizens' St. R. Co. *v.* City R. Co., 56 Fed. Rep. 746.

**Same—Same—Right to Revoke.**—Where a city has granted to a company the right to maintain a side track upon certain streets and the company has acted upon the license and expended money in the construction of the side track, the city cannot recall the privileges it has granted, unless the company fails to comply with the terms or conditions of the grant. Arcata *v.* Arcata & M. R. R. Co., 92 Cal. 639, 28 Pac. Rep. 676.

Where a city grants to a gas company the right to lay and repair gas mains in its streets, such grant amounts to a legislative contract investing the company with the right of property in the franchise thus granted which the city cannot take away or impair, without the company's consent, by any subsequent act unless it has reserved such right. Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind. 107, 49 Am. St. Rep. 183.

A city ordinance granting a company the right to construct and maintain telephone lines on its streets, when accepted and acted upon by the company by complying with its conditions and constructing a costly plant, constitutes a contract which cannot afterwards be rescinded or altered in its essential terms without the consent of the company. City of New Orleans *v.* G. S. T. & T. Co., 40 La. Ann. 41, 8 Am. St. Rep. 502.

When a city with the consent of the legislature grants a franchise to a street railway company and the legislature afterwards confirms and validates such ordinance the city cannot revoke or rescind the right so granted. Nash *v.* Lowry, 37 Minn. 261, 33 N. W. Rep. 787.

Where a city, by authority of its charter, grants to a street-railway company the right to construct a branch road over a certain street, it cannot, by a subsequent ordinance, arbitrarily annul its license; and when, under such latter ordinance, it attempts by force to prevent the completion of the road then in process of construction,

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injunction will issue restraining the city from such interference. Asheville St. R. Co. *v.* Asheville, 109 N. Car. 688, 14 S. E. Rep. 316.

Where a city by an ordinance, under statutory authority, has designated certain public streets in which the company might place its telegraph poles, and the company has expended money in placing its poles upon such streets, the city cannot by subsequent ordinances revoke such designation. Hudson Tel. Co. *v.* Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619.

City authorities, after having granted consent to a company to use a street, cannot, by revoking the city ordinance granting such authority, deprive the company of its right to use such street if, prior to the repeal, the company has made expenditures on the strength of the consent. Rio Grande R. Co. *v.* Brownsville, 45 Tex. 88, 13 Am. Ry. Rep. 223.

**Same—Same—Right to Alter or Amend.**—Where a city grants to a street-railway company the right to lay a double track, and, thereupon, the company expends a large amount of money, the city cannot afterwards, by amending the ordinance conferring the franchise, limit the company to a single track in a certain street, unless it appears that the exercise of the original right works an injury, when the city may restrict the right, under the exercise of its police power. Burlington *v.* Burlington St. R. Co., 49 Iowa 144, 31 Am. Rep. 145.

**Same—Same—New Conditions.**—Where an ordinance of a city, granting a railway company the right to construct and operate a track along a street upon certain conditions, has been accepted, the right of the contracting parties will be governed by such ordinance, and the city cannot impose new conditions and burdens upon the company without its consent, such as the construction and operation of an extended line of its road. People *v.* Chicago W. D. R. Co., 118 Ill. 113, 25 Am. & Eng. R. Cas. 258, 7 N. E. Rep. 116.

At the time a street-car company was chartered it was only required to pave between the rails. By a subsequent statute and ordinance it was required to pave one foot outside of the rails. *Held*, that this was not in violation of the provision of the federal constitution forbidding laws impairing the obligation of contracts, where a general statute provided that all corporations should be subject to legislative control. Sioux City St. R. Co. *v.* Sioux City, 78 Iowa 567, 40 Am. & Eng. R. Cas. 275, 43 N. W. Rep. 224, affirmed in 138 U. S. 98.

Where an ordinance grants to a street-railway company the privilege of laying its track in unpaved streets, provided it keep in good repair the space between the rails and for two feet on each side of the track, the city cannot compel the company to pave such space. State *v.* Corrigan Consolidated St. R. Co., 85 Mo. 263, 55 Am. Rep. 361.

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When a street railway accepts a charter requiring it to keep the streets between and near the tracks in good and proper order and repair, such acceptance constitutes a contract which the city cannot modify by requiring the company to pave the streets with asphalt. City of Binghamton *v.* Binghamton & P. D. R. Co. (Sup.), 16 N. Y. S. 225.

Where a railroad is authorized by statute to occupy streets upon obtaining the consent of the municipal authorities, the company's franchise is complete when such consent is given, and such consent cannot be subsequently withdrawn by an ordinance so as to require further consent or additional conditions. Brooklyn Heights R. Co. *v.* Brooklyn, 46 N. Y. S. R. 299, 18 N. Y. Supp. 876.

A license tax on electric light poles and wires, provided by an ordinance passed after a city has contracted with an electric light company to furnish light for the city, cannot be imposed on poles and wires which are used exclusively for light in the city, under the contract, but only on poles and wires used for furnishing light to private consumers. New Castle *v.* Electric Co. (Com. Pl.), 16 Pa. Co. Ct. R. 663, 26 Pittsb. Leg. J. (N. S.) 197.

**Same—Same—Public Safety.**—Where the public safety and convenience require it, a city may revoke a grant to a street-railway company of the right to lay its tracks in the city streets, even after the tracks have been laid. The repeal of the granting ordinance gives the company no right to compensation where the tracks were laid after the mayor and the city solicitor had informed the president of the company that at the first meeting of the city council an ordinance would be submitted to prohibit the laying of the tracks. Lake Roland El. R. Co. *v.* Mayor, etc., of Baltimore, 77 Md. 352, 54 Am. & Eng. R. Cas. 11, 26 Atl. Rep. 510.

**Same—Same—Grant of Authority by Legislature.**—Where the common council of a city, in the exercise of power conferred by the legislature, makes an absolute grant to a horse-railroad company of the right to build its road on certain streets, and the company accepts the grant and builds a part of the road at great expense, the legislature cannot, by a subsequent amendment of the city charter, make the right of the company to build the rest of the road dependent on the consent of a majority of the property owners on the street, such act being unconstitutional as impairing the obligation of a contract. Hovelman *v.* Kansas City Horse R. Co., 79 Mo. 632, 20 Am. & Eng. R. Cas. 17.

Where a city granted a street railway company the privilege of constructing and operating a railroad, provided it pave the space of 10 feet occupied by its double tracks, and, subsequently, the legislature

passed an act requiring street-railway companies to pave and keep in repair a space of 16 feet for a double track and the city then passed an ordinance requiring the company to pave 16 feet instead of 10 feet, the two ordinances and the act of legislature were valid under Const. art. 1, § 2 providing that "no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the general assembly." City of Cleveland *v.* Cleveland Electric R. Co. (Com. Pl.), 1 Ohio N. P. 413, 3 Ohio Dec. 92.

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## CITY OF KALAMAZOO

*v.*

## KALAMAZOO HEAT, LIGHT & POWER CO.

(*Supreme Court of Michigan, May 15, 1900.*)

**Corporation—Purposes of Organization.**—The contention that the only purpose of forming the defendant corporation was to bore for natural gas was not warranted by the evidence.

**Same—Abandonment of Franchise.**—The contention that the corporation abandoned its franchise granted by the plaintiff city was not sustained by the record.

**Corporate Existence—Collateral Attack.***—Where a city has treated a corporation as one in fact, and granted it a franchise, under which it operated and expended a large sum of money, and the state has not raised any question as to the regularity of its incorporation, such a question cannot be raised by the city.

**Assignment of Franchise.**—The contention that the defendant corporation was not the assignee of the natural gas and fuel company, to which the city granted the franchise in question, was not warranted by the evidence.

**Gas Companies—Use of Streets—Validity of Ordinance—Power of City to Revoke Franchise.**†—It was within the power of the common council of plaintiff city to issue a franchise to a gas company giving it the privilege of using the streets for laying pipes, etc., without reserving the right to say what streets should be so used; and where such a franchise has been issued, the city cannot exclude the company

*Los Angeles Holiness Band *v.* Spires (Cal.), 11 Am. & Eng. Corp. Cas., N. S., 393, and extensive *note*, 398 *et seq.*

†See Michigan Tel. Co. *v.* City of St. Joseph (Mich.), *ante* p. 261, and *note*, p. 270.

from laying its pipes in any of the streets; but may insist upon the work being done under such reasonable conditions and restrictions as shall make it certain it will be properly done, and may exact a bond for a reasonable amount before the work is entered upon.

APPEAL by defendant in chancery from Kalamazoo county circuit court. *Reversed.*

*William G. Howard* and *E. A. Crane*, for appellant.

*Boudeman & Adams* (*N. H. Stewart*, of counsel), for appellee.

MOORE, J. In April, 1887, the Kalamazoo Natural Gas & Fuel Company was organized. The portions of the articles of association which are material read as follows: "We, the undersigned, desiring to become incorporated under the provisions of the laws of the state of Michigan for the purposes hereinafter stated, do hereby make, execute, and adopt the following articles of association, to wit: The purpose or purposes of this corporation are as follows: To drill, bore, and mine for natural gas, petroleum, and other valuable substances, and to gather and collect the same, and to lay pipes to conduct the same, build reservoirs to hold the same, and to market said natural gas, petroleum, and other valuable substances, when obtained, in such way and manner as shall be considered most expedient and advantageous to said company. Also to lay pipes and conduct gas, petroleum, and other valuable substances through, over, and to any place or places in Michigan from places where the same may be produced. Also to manufacture gas for the purposes of fuel and generating heat, and to pipe or otherwise conduct the same to market, and to market and dispose of the same. Also to purchase and to store materials from which such gas may be manufactured; and also to purchase, hold, and lease lands for the purpose of carrying out the objects and purposes of this association." "The capital stock of the corporation here organized is the sum of ten thousand dollars, and the number of shares thereof is four hundred." "The amount of said stock actually paid in at the date hereof

Case Stated.

is the sum of one thousand and twenty dollars, being ten per cent. of said capital stock." "The term of existence of this corporation is fixed at thirty years from date hereof." Thirty-four persons subscribed to the articles of association. Their acknowledgments were taken before a notary public. The articles of association were on May 7, 1887, filed in the office of the secretary of state, and on the 11th day of May, 1887, in the office of the county clerk of Kalamazoo county. On the 6th of June the common council adopted an ordinance the provisions of which read as follows:

"Ordinance No. 52. Relative to Kalamazoo Natural Gas & Fuel Company.

"Section 1. The city of Kalamazoo ordains: That permission and authority are hereby given to the Kalamazoo Natural Gas & Fuel company, of the city of Kalamazoo, a corporation organized under and by virtue of the laws of the state of Michigan, its successors and assigns, to lay, operate and maintain all such mains and pipes as are or may be necessary and useful in conducting natural gas, and all other substances, matters and things used and to be used by the said Kalamazoo Natural Gas & Fuel Company, its successors and assigns, to manufacture or generate or make heat, or to be used for fuel or illuminating purposes, under the surface of the ground, along and under any and all streets, alleys and highways of the city of Kalamazoo, and over, upon or under any and all bridges in said city for the period of thirty years from and after the date of the passage of this ordinance, with the right and privilege of putting in the necessary escape pipes, subject, however, to all the conditions, specifications and limitations hereinafter contained.

"Sec. 2. That said mains and pipes shall be laid at least 20 inches below the surface of the ground, and, when laid, the trenches shall be laid and filled in with earth, stones or gravel, or of all, so as to leave the streets and alleys through which said pipes may be laid in as good condition as they were previous to the laying of said pipes or mains.

"Sec. 3. That all pipes to be laid under the provisions of this ordinance, and all escape pipes erected, shall be so laid and erected under the supervision and direction of the city engineer of the city of Kalamazoo, subject to the approval of the city council of said city.

"Sec. 4. That the said Kalamazoo Natural Gas & Fuel Company, its successors and assigns, shall charge all consumers of gas and fuel supplied by it the same rate per 1,000 feet for all gas or fuel consumed, and that all within the said city of Kalamazoo desiring to make use of such gas and fuel shall be supplied by the said Kalamazoo Natural Gas & Fuel Company, its successors and assigns, as soon as practicable, consistent with the ability of said Kalamazoo Natural Gas & Fuel Company, its successors and assigns, so to do.

"Sec. 5. That the said Kalamazoo Natural Gas & Fuel Company, its successors and assigns, shall have the right to abandon its rights and privileges hereby granted, with right to remove its pipes and mains, but shall restore the streets and alleys to the condition that they were in prior to the laying of said pipes.

"Sec. 6. That the provisions of this ordinance shall not be altered, amended or repealed without the consent of the said Kalamazoo Natural Gas & Fuel Company, its successors and assigns.

"Sec. 7. That the said Kalamazoo Natural Gas & Fuel Company shall signify its acceptance of this ordinance in writing, signed by its president and secretary, and filed with the city clerk of Kalamazoo within 30 days from the date of the passage of this ordinance, and in default of such written acceptance this ordinance and the provisions thereof shall become and be inoperative and void.

"Sec. 8. It shall be the duty of the said Kalamazoo Natural Gas & Fuel Company, and the said company agrees not to keep any street or place where its pipes may be laid torn up or unsafe for travel any longer than is necessary to lay pipes and make repairs; and said company further agrees to save the said city of Kalamazoo harmless from all expense,

damages and actions it may be put to, sustain or be brought against it by reason of the said company failing to comply with the terms of this ordinance, or by reason of any neglect of said company, its agents or servants."

After this ordinance was granted, several thousands of dollars were paid into the treasury, and the company commenced to bore for the purpose of obtaining natural gas. This work was continued the greater part of the year, but without success. Some of the stockholders sold their shares of stock to other stockholders. From time to time committees were appointed for the purpose of visiting other cities, and learning about the methods of making gas, with a view of operating under this franchise. In 1892 a considerable quantity of gas pipe was distributed on the streets of Kalamazoo by a company that had corresponded with the natural gas and fuel company, but no pipes were at that time laid. In 1896 the company which is defendant herein was organized under the general laws of the state applicable to gas companies. It is claimed this company was organized in pursuance of an agreement that it should be merged with the Kalamazoo Natural Gas & Fuel Company, who should convey to it its franchise, and all other assets, and that residents of Kalamazoo should furnish $6,000 in cash, and the other parties in the new corporation should furnish certain patents and sufficient money to build the plant, pipe the streets, and put the plant into operation. It is claimed the necessary transfers were made, and a large amount of money raised. The city was notified of the desire of the new company to lay pipes. Under the supervision of the city engineer, about three miles of pipes were laid, and the defendant company began to manufacture and sell gas. One of the principal streets in the city is Burdick street. Prior to, but shortly before, September, 1897, it had been paved with vitrified brick. In September, 1897, the defendant company desired to lay its pipes upon Burdick street, and so notified the city authorities. The authorities objected, because the street had been recently paved, and the pipes could not be

laid without injuring the paving. The defendant insisted upon its right to lay the pipes. The city then commenced this proceeding. The issues, as finally raised by the bill and all the amendments, are as follows: The bill of complaint, as first filed, alleges: That the Kalamazoo Natural Gas & Fuel Company was never properly organized, in that all of its subscribers did not properly execute the articles of association, and that its sole object was to bore for natural gas; and that all rights under the franchise are limited to that purpose, and would not permit the manufacture of gas, and the city could rescind the franchise at its pleasure. That the articles of association were not recorded in the register of deeds' office for Kalamazoo county, and therefore it could not receive a franchise. That the common council exceeded its authority in issuing franchise No. 52, in that it granted the privilege to the Kalamazoo Natural Gas & Fuel Company to the use of the streets, without reserving the right to say what streets, and therefore it was void. That the consent of the city council was not obtained to the transfer of the franchise No. 52 from the Kalamazoo Natural Gas & Fuel Company to the defendant, hence the transfer was void. That the Kalamazoo Natural Gas & Fuel Company was organized for a purpose different from that stated in its articles of association and in its franchise, and that it abandoned all right to franchise No. 52 more than seven years ago, and therefore it was void. The original bill was amended twice. After filing the original bill, an injunction was issued, preventing the defendant from laying the pipes on Burdick street. This injunction was modified, and the pipes were laid on that street. The first amendment alleges that there was no valid assignment of the franchise from the Kalamazoo Natural Gas & Fuel Company to the Kalamazoo Heat, Light & Power Company. The second amendment alleges that the process used by defendant company for making gas is a failure; that the originator or patentee of the Hall process several years ago attempted to impose upon the people of another locality by

using natural gas, claiming it to be made by the Hall process; that later, at Grand Rapids, Mich., they attempted to deceive the people as to the amount of gas they furnished; that they also tried to establish a plant to make the same gas at Chicago and Buffalo, and failed; that the present plant was established for the purpose of deceiving people, and for the purpose of establishing plants elsewhere; that defendant company is insolvent; that defendant's process for making gas is not practicable, and will not make good gas; that the gas cannot be made as cheap as claimed by defendant company; that defendant's gas plant sends out an obnoxious gas, so that it has become a public nuisance; that the defendant company is controlled by one Armison and Cadwell, and neither of them are taxpayers in Kalamazoo, or pecuniarily responsible; that the defendant has not repaved the streets where it has laid its pipes; that the complainant has had to repair the streets, and the defendant has neglected to repave or repair and pay for same; that the Hall process for making gas is a fake; that the complainant has the right to disregard all privileges and rights given by Ordinance No. 52. The case was tried in open court, and a mass of testimony taken. The circuit judge filed a written opinion, in which, after saying it is unnecessary to consider more than one of the questions raised, he then proceeds to say: "The question is thus fairly and squarely presented whether the defendant company has the right, under Ordinance No. 52, to lay its gas mains and pipes in any streets or alleys of the city of Kalamazoo at pleasure, and, if it so chooses, leave the streets in a dangerous condition, to be repaired at the expense of the taxpayers of the city. This question admits of but one answer." "Before passing the case, it may not be amiss to say that some of the matters stated in the pleadings and contested by the parties in their proofs have not been considered by the court in any way. Whether the process used by the defendant in the manufacture of gas is or is not one which produces the best results, whether the gas manufactured by

defendant is or is not commercially valuable, whether such gas can or cannot be furnished at a less cost than other gas, are all matters between the defendant and the consumers of its gas, and are not necessary to be considered in deciding the vital questions involved in the case." "A decree may be entered perpetually enjoining the defendant, its successors and assigns, from laying gas mains or pipes in, along, or under any street, lane, or alley or public ground in said city of Kalamazoo, except by permission of the city council of said city, and under such reasonable conditions and restrictions as may be imposed by said city council." A decree was entered in accordance with the opinion. From that decree complainant did not appeal. The defendant company did appeal. It concedes it may not arbitrarily lay its pipes where it pleases, and that the city has a right to supervise the laying of its pipes to see that it is properly done, but insists it has the right, subject to the right of reasonable supervision under the terms of the franchise, to lay its pipes in all the streets of the city.

Many questions are raised by counsel, but we shall not discuss them all. It is claimed the only purpose of forming the Kalamazoo Natural Gas & Fuel Company, and the granting to it a franchise, was to bore for natural gas. That may have been the principal purpose, but the articles of association and the provisions of the franchise name other purposes, and these terms and provisions cannot be limited by oral testimony. It is claimed the company abandoned its franchise. This claim is successfully contradicted by the record. It is urged there never was a legal corporation known as the Kalamazoo Natural Gas & Fuel Company, because the provisions of the statute were not followed. It is said some of the subscribers to the articles were firms or co-partnerships, only one member of whom purported to acknowledge for the firm, and also because four corporations signed for stock, which corporations were not authorized to take stock. It is also objected that the articles of associa-

Corporation—Purposes of Organization.

Same—Abandonment of Franchise.

tion should have been recorded in the office of the register of deeds instead of being filed in the office of the county clerk. The statute provides that any number of persons not less than five may sign articles of association. Section 7117, Comp. Laws. Upwards of 20 persons properly signed and acknowledged the articles of association, and it is doubtful if any of the irregularities were fatal to the organization of a corporation *de jure*; but we do not deem it necessary to decide that question. It is apparent an honest effort was made to organize a corporation in conformity with the provisions of law. Articles of association were prepared, signed, and acknowledged, and filed with public officials. Shares of stock were subscribed and paid for. Officers were elected. A petition was presented to the complainant city for a franchise. The city treated the corporation as one in fact, and granted to it a franchise, under the terms of which it operated and expended a large sum of money. The state has never raised any question about the regularity of the corporation.

Corporate Existence—Collateral Attack.

Under these circumstances we understand the rule established by law as well as reason is that parties recognizing the existence of corporations by dealing with them have no right to object to any irregularity in their organization. Swartwout *v.* Railroad Co., 24 Mich. 393; Bank *v.* Stone, 38 Mich. 779; Railroad Co. *v.* Johnson, 49 Mich. 148, 13 N. W. 492; *Id.*, 55 Mich. 456, 21 N. W. 888; Grand Rapids *v.* Grand Rapids Hydraulic Co., 66 Mich. 606, 33 N. W. 749; Eaton *v.* Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; 2 Mor. Priv. Corp. §§ 750–754; Railway Co. *v.* Mills, 85 Mich. 647, 48 N. W. 1007.

It is insisted the defendant is not the assignee of the natural gas and fuel company. The oral testimony is that the defendant succeeded to all the rights of the earlier company.

Assignment of Franchise.

The records of that company recite that at a meeting, where 376 out of the 400 shares of the stock of the company were represented, a proposition had been made by the defendant company to purchase all the real estate, property, and assets, including

the franchise, of the earlier company, for $1,000; that a resolution was unanimously adopted "that the proposition * * * be and is hereby accepted, and that this company does sell and convey to said last-mentioned corporation the real estate, property, and assets of all kinds, together with its franchises, and all rights and privileges thereunder of this corporation, for the cash sum of one thousand dollars." The directors were authorized to take all necessary measures to carry out the arrangement. Resolutions of a like character were passed by the board of directors. A deed of all the real estate and appurtenances was made to defendant company. The consideration named therein was $1,000. The books and papers of the earlier company were turned over to the later one. Some of the stockholders were paid in money for their stock; others of them exchanged it for stock in the new company. The new company took possession of the plant of the old company, and has since claimed to be the owner of it, and we have no doubt it has succeeded to the rights of the earlier company. Before this suit was brought, upwards of $30,000 had been expended by the two companies. It is doubtless true the ordinance was not a wise one to make, but it was within the power of the council to make it, and the city is bound by its terms. There is a good deal of testimony tending to show that the defendant company, when it laid its pipes, did not put the street in good repair. It was its duty to do so. It may not tear up the streets, and leave them out of repair. The city may not exclude the company from laying its pipes in any of the streets, alleys, or highways of the city, but it may insist upon the work being done under such reasonable conditions and restrictions as shall make it certain the work will be properly done; and, if it deems it necessary, it may exact a bond for a reasonable amount before the work is entered upon. The decree of the court below is reversed, and one will be entered here in accordance with this opinion.

Gas Companies—Use of Streets—Validity of Ordinance—Power of City to Revoke Franchise.

HOOKER, J., did not sit. The other justices concurred.

JONES

*v.*

CITY OF DEERING.

*(Supreme Judicial Court of Maine, May 12, 1900.)*

**Defect in Street—Injury to Pedestrian—Liability of City.***—*Held*, that a stake four inches high in the line of the street curbing, upon which plaintiff stepped and received her injury, was a defect in the way; that it was placed there by the city engineer when the sidewalk was constructed, and was negligently allowed to remain long after work upon the sidewalk had been completed; that the plaintiff was in the exercise of due care; and that the injury resulted solely from the defective way, for which defendant is responsible.

**Same—Same—Damages.**—In a case submitted to the law court with jury powers to find the facts and assess damages, it appeared that the plaintiff was injured April 30, 1898. She was treated by skillful physicians; she suffered great pain; unable to sleep, except under opiates, until November 29th, when an operation was performed on her foot, pus taken out, a point of bone found diseased, and at the time of the trial below, in January, 1899, she was unable to step on that foot. Her attending physician was not able to state that she would certainly have a good foot. Another doctor testified that the plaintiff will always walk a little limpy, but may eventually have a good foot, and walk without a cane or crutches.

It is considered by the court that the nature and painfulness of the injury, its long duration, and probably a longer continuance, and the future lameness and sensitiveness, also the statute limit of $2,000 as the maximum that can be recovered for an injury from a defective way, warrant an assessment of damages at $1,000.

(Official.)

REPORT from Cumberland county superior court. *Judgment for plaintiff.*

Argued before EMERY, HASKELL, WISWELL, STROUT, SAVAGE, and FOGLER, JJ.

*See Sheator *v.* Chrisman (Ill.), 4 Mun. Corp. Cas. 225, and *foot-note*.

Jones *v.* City of Deering

*E. E. Heckbert* and *Fred V. Matthews*, for plaintiff.
*Scott Wilson* and *Carroll W. Morrill*, for defendant.

STROUT, J. In June, 1897, the city council of Deering ordered a brick sidewalk to be built on Pearl street, between Forest avenue and Deering avenue. It was built in August of that year under the supervision and direction of the street commissioner, an officer required by the charter to be annually elected by the council, whose duty is there defined, "to superintend the general state of the streets, roads, bridges, * * * sidewalks and lanes in the city; to attend to the repairs of the same." In performance of this duty the street commissioner was daily upon this work, and the sidewalk was constructed under his direction and control. Case Stated.

From the termination of the brick sidewalk an earth walk of equal width extended easterly to the railroad. The earth walk, at its junction with the brick, was of even grade with it and slightly descended in its course eastward. On the side of the brick walk next to the carriage way there was a stone curbing, at grade with the brick, all forming a part of the walk, the whole being six feet in width. The stone curbing extended easterly about four feet beyond the brick.

An ordinance of the city required an annual election by the council of a city engineer. His duties are defined, to "have charge of all the plans of streets belonging to the city; he shall make all surveys, admeasurements and levels of streets in the city and plans and profiles of the same, * * * and perform such other surveying and engineering services as may be required by the mayor and aldermen or any committee of the city council."

The charter also provides that, when sidewalks have been constructed, they "shall forever thereafter be maintained and kept in order by said city." An ordinance in regard to sidewalks provides that "all work [is] to be done under the supervision of the street commissioner, or to the satisfaction of the committee on streets and the city engineer."

The city engineer made the survey and established the

grade of this sidewalk, and it was constructed in accordance therewith.

Both the street commissioner and the engineer say that it was necessary for the engineer to drive stakes in the line of the proposed curbing, at a distance of about fifty feet between them, to indicate the grade to which the workmen should make the walk, and another line of stakes about eighteen inches nearer the carriage way, to guide the excavation for the curbing, and that it was always done in this way, and was so done in this instance.

At the easterly end of the curbing, and in line with its center, and about one foot from it, there was a stake driven into the ground, and rising above it about four inches, and outside the line of curbing, and about eighteen inches therefrom another stake. Both these stakes, we are satisfied, were driven by the engineer, or by his direction, for the necessary purpose of construction, and were not removed when the work was completed, and were there on April 30, 1898, when the accident occurred.

The stake in line of the center of the curbing is the one complained of. At that time it was weather worn, and so nearly the color of the earth walk as not to attract attention. As one of a line of grade stakes, and necessary to the purpose of construction of the walk, it cannot be regarded as a defect while temporarily there, during the continuance of the work. But, when allowed to remain long after its necessary use and purpose had been accomplished, it rendered the walk defective. It "unlawfully impaired the reasonable safety and convenience of the way." That it was dangerous is apparent from the injury it inflicted upon the plaintiff. It is not clear from the evidence whether the stake was round or square, but it was of small diameter, not exceeding two inches, at most. If the stake was one of the grade stakes, as we are satisfied it was, it was placed there by the officers of the city who were specially charged with the duty of repairing and constructing the walk, and must be regarded as the act of the city. In such case, the statute requirement of 24

hours' notice of the defect does not apply. Holmes *v.* Paris, 75 Me. 560.

If it were otherwise, both the street commissioner and engineer knew of the existence of the line of grade stakes, of which this was one, at the time the work was done.

They were driven there by the engineer or by his direction, and improperly allowed to remain after the work had been completed. If not now able to recollect this particular stake, still the street commissioner must have had knowledge of its existence while at work on the ground, which is sufficient to meet the requirement of the statute.

At about 2 o'clock in the afternoon of April 30, 1898, the plaintiff and a female friend were walking slowly on and over the brick and stone sidewalk toward Forest avenue; the plaintiff being on the side nearest the carriage way, and probably on or near the stone curbing which was a part of the sidewalk, where she had a right to be. When she stepped from the brick to the earth walk, which was there continued at the same grade, she stepped upon this grade stake, which turned her foot, and badly sprained her ankle.

She had no previous knowledge of the existence of the stake, and its appearance at that time, after eight months' exposure to the weather, did not present sufficient contrast to the color of the earth walk to attract attention. It appeared to be continuous, smooth, and even. She cannot be charged with lack of reasonable care, nor of any contributory negligence. In our view, her injury was caused solely by the defective way, for which the defendant city is responsible. No other question is raised by the defendant.

Defect in Street—Injury to Pedestrian—Liability of City.

By the terms of the report, the plaintiff's damages are to be assessed by this court. The accident occurred on the 30th day of April, 1898. She was treated by skillful physicians; she suffered great pain; unable to sleep, except under opiates, until November 29th, when an operation was performed on her foot, pus taken out, a point of bone found diseased, and at the time of

Same—Same—Damages.

the trial below, in January, 1899, she was unable to step on that foot. Dr. Bray, her attending physician, thinks that in a year she may "have a pretty good foot," if she does not develop any diseased bone there; but to the question, "would you be able to state about the certainty of her having a good foot?" he answered, "No sir."

Dr. Cummings thinks she will ultimately have "a pretty good foot. It will always be sensitive. She will always walk, perhaps, a little limpy, but I think some time—eventually—she will have a pretty good foot, and walk without a cane and without a crutch." Considering the nature and painfulness of the injury, its long duration and probably longer continuance, and the future lameness and sensitiveness, and in view of the statute limitation of $2,000 as the maximum that can be recovered from a city for an injury from a defective way, we assess the damages in this case at $1,000.

Judgment for plaintiff for $1,000.

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## CITY OF ASHLAND

*v.*

## CHICAGO & N. W. RY. CO.

(*Supreme Court of Wisconsin, Dec. 15, 1899.*)

**Vacation of Street—Injunction—Estoppel.**—In a suit by a city against a railroad to restrain the latter from obstructing a street, the question whether there is any evidence in the record to show that the city has ever accepted the obstructed part of the street could not be raised by defendant, as its petition for the vacation of such portion and its agreement with the city, relied upon by it to create an estoppel, recognized the existence of such street.

**Streets—Dedication—Acceptance.***—A municipal corporation may accept a street at any time prior to the withdrawal of the offer of dedication.

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*See note at end of case.

City of Ashland *v.* Chicago, etc., Ry. Co

**Same—Estoppel of Municipality.**—A city may be estopped by its acts from claiming that a given locality is a street.

**Same—Dedication—Nonuser—Successors in Interest.**—When lands have been properly dedicated for a street, no mere nonuser for any period of time will operate as an abandonment of the rights conferred; and, until the time arrives when the street is needed for actual use, all persons in possession are deemed to hold subject to such rights.

**Same—Sale—Ultra Vires—Estoppel.**—A contract between a city and others for the sale of one of its streets is *ultra vires* and void, and cannot estop the city.

**Same—Vacation—Ultra Vires—Estoppel.**—An attempted vacation of a street which is repugnant to a statutory provision requiring, as a condition precedent to the city council's authority to act, the petition, in writing, of all the owners of lots or lands on the street, and due notice to be published, is *ultra vires* and void, and cannot estop the municipality.

**Same—Dedication—Attempted Vacation—Taxation of Land.***—When the dedication of a street was complete, the fact that taxes are collected on the land by the municipal authorities, after an attempted vacation of the street, will not necessarily affect the rights of the public.

APPEAL by plaintiff from Ashland county circuit court. *Reversed.*

Case Stated.

In 1857 the owners of the land covering the street in controversy platted the same, and filed and recorded such plat in the proper register's office. The street in question was named "Madison Avenue." In 1887 the common council of Ashland changed its name to "Fourth Avenue West." According to the scheme of the plat, the streets running parallel with the shore of the bay are called "streets,"—the first being named "Front Street"; the second, "Second Street," and so on in numerical order, extending back from the bay. The streets running at right angles with the streets aforesaid are called "avenues." Madison avenue, now known as "Fourth Avenue West," runs in a southerly direction from the bay for nearly 1½ miles, and connects the residence with the business portion of the city. That portion of Fourth avenue West more

*See City of Davenport *v.* Boyd (Iowa), 4 Mun. Corp. Cas. 161.

particularly in question in this action lies between Third and Sixth streets. That portion of Fourth avenue between Front and Third streets, prior to 1890, had been graded and planked, and generally used for street purposes. That portion lying to the southward of Sixth street had also been graded and improved prior to said date. Prior to 1892 that portion of Fourth avenue between Third and Sixth streets had never been improved. During that year the city caused a sidewalk to be built on the east side of Fourth avenue from Third to Fourth street, and the west side of said avenue from Fourth to Sixth street, which was used by pedestrians as they saw fit. The railroad track of defendant enters the city limits on the east, and extends westward across and over Fourth avenue between Third and Sixth streets. The Northern Pacific and Wisconsin Central Railroads also have tracks running parallel with defendant's on the north. Early in 1896 the defendant and other railroad companies removed said sidewalk. They were replaced by the city and maintained until February, 1897, when they were again torn up by the companies, and a fence erected across said avenue between Fourth and Sixth streets, completely obstructing it. The city brings this action to compel the defendant to remove the fence and restore the sidewalk, and asks an injunction restraining the defendant from obstructing the avenue. The defendant set up, and the court found, that in the year 1860 the owners of the plat presented a petition to the county board, asking for a vacation of a portion of said plat, including the part involved in this suit, and by resolution the board attempted to vacate it; that after the date of said resolution, and for about 20 years, the proper officials assessed said property as acreage property; that said street, between the north line of Sixth street and a point halfway between Third and Fourth streets, was never worked or traveled by teams; that prior to the organization of the city of Ashland the town authorities erected a hose house between Third and Fourth streets, in the limits of Fourth avenue; that prior to 1887 the Milwaukee, Lake Shore & Western

Railway Company, to whose rights the defendant succeeds, laid its tracks across Fourth avenue, as before stated; that in said year said company and the other railway companies mentioned entered into a contract in writing with the city whereby it was agreed that the city should take the necessary steps to vacate that part of Fourth avenue lying between the north line of Sixth street and a point halfway between Third and Fourth streets, and in consideration of such vacation the railroad companies agreed to defray the expense of grading and constructing an undercrossing on Vaughn avenue, being the next street west of Fourth avenue, and to pay the expenses of a box culvert to drain a street; that the said Lake Shore Company paid its proportion of said expenses to the city (shown by the evidence to be $782.97), and performed all the stipulations of its said agreement; that on December 1, 1887, the city passed an ordinance in form vacating said part of said avenue. This ordinance was conceded to be invalid because of failure to observe charter regulations. The seventh finding is to the effect that said company, relying upon the action of the county board in 1860 and of the common council in vacating said street, laid out and expended large sums of money in the construction of its yard, and in building an iron bridge over Vaughn avenue, and in paying the expenses of excavating said avenue and constructing said box culvert. On June 26, 1888, the council passed an ordinance repealing the ordinance of December 1st, and thereafter constructed the sidewalk before mentioned. The money paid to the city by the Lake Shore Company was not paid until after the repeal of the ordinance attempting to vacate the street. The trial court decided that the city was estopped, under the circumstances, from claiming that the part of the street in question was not vacated, and entered judgment dismissing the complaint. Due exceptions to the findings were filed. The plaintiff appeals from the judgment.

*E. E. Brossard* and *Gleason & Sleight*, for appellant.

*Tomkins & Merrill* and *Fish, Cary, Upham & Black*, for respondent.

City of Ashland v. Chicago, etc., Ry. Co

BARDEEN, J. (after stating the facts). It was conceded on the argument that the action of the county board in 1860, and the action of the city council of Ashland in 1887, in attempting to vacate the part of the street in question were void and of no effect. This leaves the main question to be considered,—whether the city is estopped from claiming this part of the street to be a public highway. Before proceeding to determine that question, we will notice a point raised by the defendant. It is said that there is no evidence in the record to show that the city has ever accepted that part of the street attempted to be vacated as a street. We do not see how the defendant is in a position to raise that question. The petition of the railroad company, and subsequent agreement with the city, relied upon as creating an estoppel, recognize the existence of this street. If the facts shown as claimed are sufficient to constitute an estoppel, this question is of no importance. If there are not, then, under well-settled legal principles, the city was not obliged to signify its acceptance until the time arrived when that part of the street would be required for use. Reilly *v.* City of Racine, 51 Wis. 526, 8 N. W. 417; State *v.* Leaver, 62 Wis. 387, 22 N. W. 576; City of Racine *v.* Chicago & N. W. Ry. Co., 92 Wis. 118, 65 N. W. 857. The filing by the owners of the land of the plat showing the streets, in the way pointed out by the statute, was a dedication to public use. Acceptance is in time, if made any time before the offer to dedicate is withdrawn. Price *v.* Town of Breckenridge, 92 Mo. 378, 5 S. W. 20; White *v.* Smith, 37 Mich. 291. No legitimate proof was offered, showing a withdrawal of this dedication. On the trial it was stipulated that between Ellis and Vaughn avenues, which were four blocks apart, and southward of Sixth street, there were in the neighborhood of 100 residences which were occupied, and that the citizens occupying that property would either cross the railroad track by Ellis or Fourth avenues, if open, or Vaughn avenue, if Fourth were closed, in going to the business part of the

Vacation of Street—Injunction—Estoppel.

Streets—Dedication—Acceptance.

city, to the north. This is a part of the territory that was sought to be vacated by the action of the county board in 1860, and the inference is plain that the original owners or their grantors have continued to treat the same as not having been vacated. Moreover, it is alleged in the complaint, and admitted in the answer, that Fourth avenue West, between Third and Front streets, had been opened and worked by the city prior to 1890, as also had been that portion south of Sixth street. Under these circumstances, it would be quite unreasonable to say that the city did not intend to accept the dedication of this portion of the streets between the points mentioned. But, whether this be so or not, under the rule stated in City of Racine *v.* Chicago & N. W. Ry. Co., 92 Wis. 118, 65 N. W. 857, unless the city is estopped, the city might signify its acceptance whenever the time arrived that this part of the street was required for actual public use. The doctrine that a city may be estopped by its acts from claiming that a given locality is a street has been asserted and applied in this state, and is so well settled as to be no longer open to question. Goodrich *v.* City of Milwaukee, 24 Wis. 436; Reilly *v.* City of Racine, 51 Wis. 530, 8 N. W. 417; Paine Lumber Co. *v.* City of Oshkosh, 89 Wis. 449, 61 N. W. 1108; Reuter *v.* Lawe, 94 Wis. 300, 68 N. W. 955, 34 L. R. A. 733. The doctrine is equally well settled that, when lands have been properly dedicated, no mere nonuse for any period of time will operate as an abandonment of the rights so conferred, and that, until the time arrived when the street was needed for actual use, all persons in possession were deemed to hold subject to such rights. In addition to cases before cited, see the following: Childs *v.* Nelson, 69 Wis. 125, 33 N. W. 587; Chase *v.* City of Oshkosh, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553; Nicolai *v.* Davis, 91 Wis. 370, 64 N. W. 1001; City of Madison *v.* Mayers, 97 Wis. 399, 73 N. W. 43, 40 L. R. A. 635.

Same—Estoppel of Municipality.

Same—Dedication—Nonuser—Successors in Interest.

The arguments as to nonacceptance and abandonment may be classed together. As already noted, the defendant is in

no position to urge either the one or the other. The company to whose rights the defendant has succeeded recognized the existence of the street in the alleged agreement with the city to vacate it, and, unless sufficient appears to work an estoppel, defendant was not justified in closing the street. The alleged estoppel is based upon the finding that the city and the railroad companies entered into an agreement by which the city agreed to vacate the street, and the companies to pay for certain specified improvements in other streets. The proposition of the railroad companies is not based simply on the condition that the city should vacate this one street. It includes a large number of other streets and alleys, and was based upon the condition precedent that the city should not only vacate and discontinue these various streets and alleys, but should grade down or excavate Vaughn avenue so as to make an undercrossing, and save the companies harmless from any and all damage by reason thereof. Upon the acceptance of this proposition, each company was to pay for excavating not to exceed a certain specified number of cubic yards of earth, and certain other expenses for a box culvert extending along Vaughn avenue from Third to Sixth street. In the first place, the companies knew, or were bound to know, that the city had no power to make any such contract. The streets of a city are not held to be bought and sold or bargained away at the will of the common council. Trester *v.* City of Sheboygan, 87 Wis. 496, 58 N. W. 747. In the opinion of this case, MR. JUSTICE WINSLOW says: "Now, no one will contend that the city has the power of sale of a street easement, however it may be acquired. It may by proper proceedings vacate, but it cannot sell its easement. This is fundamental." Now, how may it vacate? Certainly only by compliance with statutory requirements. Subdivision 30, § 4, subc. 6, of chapter 27, Laws 1889 (the city charter), gives the powers to the council to vacate streets, but does not prescribe how that power shall be exercised. In such case the power could only be exercised as pointed out in James

Same—Sale —Ultra Vires—Estoppel.

Same—Vacation —Ultra Vires—Estoppel.

*v.* City of Darlington, 71 Wis. 173, 36 N. W. 834; that is, by following the provisions of the general statute. Section 904, Rev. St. 1878. This section required the petition, in writing, of all the owners of lots or lands on any street or alley, and due notice to be published, before the council had authority to act. Any contract to secure such a petition was outside of the usual municipal functions, and, of course, the council had no authority to make it. Thus, at the very outset of their negotiations, the companies knew that they were seeking a contract the city had no authority to make. Any act done, or payment made, relying thereon, was done or made at their peril. The companies knew, or were bound to know, that the ordinance and the preceding resolutions of acceptance were *ultra vires* and void. They knew, or were bound to know, that the ordinance of December 1, 1887, was repealed by the council June 26, 1888. The case is entirely barren of any evidence of any action on their part between said dates. The money paid by the Lake Shore Company was not paid until July 5, 1888,—nine days after the ordinance was repealed. The switch in the center of Fourth avenue "was built between the 4th of December, 1887, and the year 1892," according to the stipulation of the parties; and the bridge across Vaughn avenue was built "before this action was commenced." Just when they were built, does not appear. If the parties are not able to fix a more definite time, certainly this court cannot presume they were built after the passage of the ordinance of vacation, and before its repeal. Testimony to establish an estoppel against the city must be clear, distinct, and of such a character as to amount to a fraud, to permit it to claim otherwise. The rule is never applied as freely against the public as against private persons. It is only when some affirmative action has been taken, or when there has been some great negligence or delay with relation to some matter upon which the parties have a right to rely, that the court will be authorized to apply the rule, so as to prevent manifest injustice or wrong. Reuter *v.* Lawe, 94 Wis. 300, 68 N.

Note

W. 955, 34 L. R. A. 733. Such injustice or wrong must be firmly established by facts and circumstances that leave no room for doubt or controversy. The suggestion that taxes were levied and collected on this property by the town authorities after the attempted vacation by the county board in 1860 is of no great significance. When the dedication is complete, such fact, of itself, will not necessarily affect the rights of the public. Reuter *v.* Lawe, 94 Wis. 300, 68 N. W. 955, 34 L. R. A. 733, and cases cited. The testimony on that subject is meager and indefinite. It consists in the mere statement by one of the former owners that, after the attempted vacation, he and other parties "continued to pay taxes all the time, as lands," until 1872 or 1873. It needs no argument to demonstrate the inconclusive character of such testimony. So, in any aspect we may view the case, it neither appears that the city had abandoned its right to claim the street, nor that it has been guilty of any such delay, or has done any lawful act upon which defendant or its predecessor had a right to rely, sufficiently to work an estoppel. We think it sufficiently appears that whatever was done by the companies was done in reliance upon the alleged contract to vacate, and, that having been made without even color of right, it furnishes no proper basis upon which to found an estoppel. The judgment of the circuit court is reversed, and the cause is remanded, with directions to enter judgment for the plaintiff as prayed for in the complaint.

Same—Dedication—Attempted Vacation—Taxation of Land.

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NOTE.

Dedication—Time of Acceptance.—It may be stated as a general rule that an acceptance must be made in a reasonable time, what time is reasonable depending in a great measure on the circumstances of the particular case. So long as the original proprietor, or those claiming through him, take no steps to withdraw the offer, it must be considered as continuing. White *v.* Smith, 37 Mich. 291; Denver *v.* Clements, 3 Colo. 472; Guthrie *v.* New Haven, 31 Conn. 308; Shea *v.* Ottumwa, 67 Iowa 39; Baltimore *v.* Frick, 82 Md. 77; Board of Super-

Note

visors *v.* Banks, 44 Mich. 467; Field *v.* Manchester, 32 Mich. 279; Price *v.* Breckenridge, 92 Mo. 378; Jersey City *v.* Morris C. & B. Co., 12 N. J. Eq. 547; Bridges *v.* Wyckoff, 67 N. Y. 130; *In re* Extension of North Third Ave., 3 N. Y. Supp. 641; Clements *v.* West Troy, 10 How. Pr. (N. Y.) 109; Rung *v.* Shoneberger, 2 Watts (Pa.) 23, 26 Am. Dec. 95; Simmons *v.* Connell, 1 R. I. 519; Oswald *v.* Grenet, 22 Tex. 94; Baldwin *v.* Buffalo, 35 N. Y. 375; Chafee *v.* Arken (S. Car.), 35 S. E. Rep. 800; *In re* Hunter, 62 N. Y. Supp. 169; Hardy *v.* Memphis, 10 Heisk. (Tenn.) 127; Little Rock *v.* Wright, 58 Ark. 142; Carter *v.* Portland, 4 Ore. 339; Eureka *v.* Armstrong, 83 Cal. 623; Briel *v.* Natchez, 48 Miss. 423; *In re* Opening of Beck St., 44 N. Y. Supp. 1087; Peoria *v.* Johnston, 56 Ill. 45; Crockett *v.* Boston, 5 Cush. (Mass.) 182.

In Wayne County *v.* Miller, 31 Mich. 447, COOLEY, J., said: "As to the remainder, the case is one of an offer to make to the public a dedication or grant of lands which for more than twenty years the public has neglected to accept. After what length of time such an offer must be regarded as withdrawn, circumstances may perhaps determine, but unless there were facts equivalent to a continuous renewal of the offer, it cannot be considered open after the lapse of a period of time sufficient to bar all actions for the recovery of lands under the statute of limitations. After such a laspe of time, the dedication to public uses must be regarded as confined to the bounds within which the action of the public with the presumed acquiescence of the donor has practically limited it."

Immediate user of the land offered is not necessary. McCormick *v.* Baltimore, 45 Md. 512. User in a length of time that is reasonable under the circumstances is sufficient. Oswald *v.* Grenet, 22 Tex. 94.

A reasonable time has been held, where land was dedicated for a street, to be the time required for the occupation of the abutting lands. Guthrie *v.* New Haven, 31 Conn. 308.

An acceptance two years after the offer of dedication is sufficient to prevent revocation. Wolfskill *v.* Los Angeles County, 86 Cal. 405.

The failure of a city to grade a street in a hilly district, not thickly settled, is not unreasonable. Shea *v.* Ottumwa, 67 Iowa 39.

A dedication may be completed by either present or future acceptance. Hague *v.* West Hoboken, 23 N. J. Eq. 354; Street *v.* Griffiths, 50 N. J. L. 656.

Delaying acceptance of land dedicated as an alley for fifteen years, during which period it had been enclosed and used, is unreasonable. Lagrange *v.* Bain, 4 Ky. L. Rep. 256. See Grandville *v.* Jenison, 84 Mich. 54; Cambridge *v.* Cook, 97 Iowa 599; Schmitz *v.* Germantown, 31 Ill. App. 285.

A delay of twenty years in accepting a street is unreasonable.

*In re* Hunter

John Monat Lumber Co. *v.* Denver, 21 Colo. 1; Vermont *v.* Miller, 161 Ill. 210; People *v.* Reed, 81 Cal. 70, 15 Am. St. Rep. 22.

A delay of more than nine years in acceptance has been held unreasonable. Forsyth *v.* Dunagan, 94 Cal. 438.

Nor is an acceptance made ten years after the offer and after the owner's death sufficient. People *v.* Kellogg, 67 Hun (N. Y.) 546.

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## *In re* HUNTER.

(*Court of Appeals of New York, June 22, 1900.*)

**Streets—Dedication—How Shown.***—In the absence of statutory requirements, the dedication and acceptance of land as a public street may be proved by the acts of the parties and the circumstances of the case, as neither a formal dedication, tender of dedication, nor acceptance is essential.

**Same—Same—Tender of Dedication—Successors in Interest.***—An informal tender of dedication of land to the use of the public as a street, implied from acts and circumstances, although not accepted by the municipality for several years after it was made, will be binding upon the successor in interest of the party making it, unless revoked before its acceptance.

**Same—Same—Acceptance.**†—The acceptance of such a tender of dedication is shown by the passage of an ordinance directing the construction of a sewer through the land and designating and treating it as a street.

APPEAL by defendant from appellate division, Third department supreme court. *Reversed.*

Case Stated.

During the year 1898 the city of Albany constructed a sewer, and assessed a portion of the expense upon premises owned by Margaret A. Hunter, who instituted this proceeding to set the assessment aside upon the ground that one of the streets, so called, through which the sewer passed, was not a public highway, but her private property. Both parties conceded that, unless the strip of land called "Rawson Street" was a public street, the construc-

*See City of Ashland *v.* Chicago & N. W. Ry. Co. (Wis.), *ante*, p. 288, and *note*, p. 296.

†See *note*, 4 Mun. Corp. Cas. 251 *et seq.*

tion of the sewer therein was unauthorized, and the assessment unwarranted. The facts, as stated by the special term, are substantially as follows: "The premises in dispute, together with considerable surrounding property, were purchased in 1861 by Andrew R. Hunter, the husband of the petitioner, who died in 1893. In 1873 he caused a map of his property to be made, which was filed in the county clerk's office in 1877. This map shows a street called 'Rawson Street,' 70 feet in width, leading from Central avenue northerly to lands of the New York Central Railroad Company, crossing streets indicated upon the map as Hunter avenue, Second street, Third street, and Lumber street; the latter street being now known as 'Livingston Avenue.' The evidence shows that after the making of this map Mr. Hunter conveyed several lots, described with reference to the map, and with reference to Rawson street as there laid down. In 1875 the city purchased from Mr. Hunter a considerable tract of land for a public reservoir, and upon the construction of the reservoir the portion of Rawson street, as indicated upon the map, lying between Hunter avenue and Third street, was closed; leaving, however, those portions of Rawson street shown upon the map between Central and Hunter avenues, and between Third and Lumber streets, the same as before. It also appears that from 1875 to 1890 the assessors of the city made their assessments of the property of Mr. Hunter on Rawson street with reference to the lots and to that street as laid down upon the map, and that during those years he was not assessed and did not pay any tax upon the lands designated as Rawson street thereon. In July, 1889, Mr. Hunter caused a new map of a portion of his property to be made, showing an open way, 66 feet in width, leading from Third street to Livingston avenue, but not designated thereon as a street or by any name, but showing this way as leading at right angles from Livingston avenue, instead of from Third street, as Rawson street had been indicated upon the map of 1873. The southerly end of this open way at Third street upon the map of 1889 was very nearly in the same place as

was Rawson street upon the map of 1873, at that location; but the northerly end of this open way, at Livingston avenue, was carried a little more than its width further west than the place indicated as 'Rawson Street' on the map of 1873. There is no proof that the map of 1889 was ever filed in the county clerk's office, but the testimony shows that subsequent to its date, and down to the death of Mr. Hunter, the assessments of this property were changed to correspond with the new map, and that he paid his assessments so made. * * * These changed assessments did not include, and Mr. Hunter did not thereafter pay, any tax upon the open way or street shown upon the map of 1889. Since Mr. Hunter's death the assessments have continued in the same way against the petitioner, and she has received a like exemption of this open way from taxation. In 1890 Mr. Hunter and his wife conveyed the lot on southwesterly corner of Livingston avenue and this open way, as appearing upon the map of 1889, and one-half of the lot next adjoining thereto on the south, as shown on such map, to Robert Burns, and described such premises as being bounded 'east by the west line of Rawson street.' * * * The evidence shows the use of the open way, indicated upon the map of 1889, by pedestrians and vehicles as a public street for from ten to fifteen years past, during which time it has been fenced upon each side along lines corresponding with those appearing upon the map. During this time it has been open to, and in fact used very largely by, the public in passing between Third street and Livingston avenue, and has furnished the only avenue communicating with those streets between Colby street and New York Central avenue. It is also shown that Rawson street has been known in that neighborhood as a public street for twenty-five years past. The photographs in evidence show a well-beaten road or carriageway over this open way, of the same general character as that of the connecting streets. The common council in June, 1871, adopted a resolution that the next street west of New York Central avenue, 'running from Central avenue north to Lumber street, be called Rawson street.' It

also passed a resolution in December, 1879, directing the street commissioner to 'cause a cross-walk to be placed on Rawson street at Central avenue.' "

It does not appear that any work was ever done on Rawson street, as laid out on the map of 1889, under the sanction of the city authorities; but on the 16th of May, 1898, the following ordinance was adopted by the common council, and two days later was approved by the mayor: "A law to authorize the construction and laying of a vitrified stone-ware pipe sewer from the brick sewer constructed by the N. Y. C. & H. R. R. R. Co. southerly along lands belonging to said railroad company and to others, to Livingston avenue, and thence southerly along the center of Rawson street to the center of Third street, and thence east along the center of Third street to a point about fifty feet west of New York Central avenue, and also west from the center line of Rawson street along the center of Third street to the east line of Colby street. The city of Albany in common council convened ordains as follows: It is hereby ordered and directed that a vitrified pipe sewer be constructed and laid from the culvert lying north of and adjacent to the southerly tracks of the New York Central & Hudson River Railroad Company, now used for passenger trains, southerly through lands of said railroad company * * * to Livingston avenue; thence southerly along Rawson street, as declared by ordinance to be a public street in the city of Albany, to the center of Third street; thence, dividing, the sewer is to be laid both east and west, the easterly portion running through the center of Third street to a point about fifty feet west of the west line of New York Central avenue, and the westerly portion running through the center of Third street to the east line of Colby street; provided, however, that the portion of said sewer constructed underneath the tracks of the New York Central & Hudson River Railroad Company shall consist of an iron pipe of the same inside dimensions as that portion of the sewer immediately adjoining on the north: and provided further, that the said sewer may, if the proper permission be obtained, be connected with and have its outlet in a certain

vitrified pipe sewer or drain now extending through said railroad lands from said Patroon creek culvert in a southerly direction to a point at or near the southerly line of said railroad lands near their intersection with the continuation of Rawson street; and that such vitrified pipe sewer be constructed and laid in the following manner, namely: To be circular in shape and fifteen inches in interior diameter in the clear, for that portion in Rawson street and its northerly continuation, and to be twelve inches in interior diameter in the clear for that portion lying in Third street. * * *" The rest of the ordinance, which related wholly to the sewer in question, and directed it to be built through the lands in question, is not material. On the same day that this ordinance was adopted one of the aldermen gave notice that he would at the next regular meeting of the common council move the passage of an "ordinance accepting Rawson street," and such an ordinance was adopted on the 6th of June following. In the meantime, however, and on June 4, 1898, the respondent, who had succeeded to the rights of Andrew R. Hunter in the lands in question and the adjoining lands belonging to him at the time of his death, had caused Rawson street, so called, to be closed by fences at either end. These fences remained until the 7th of July, when they were removed under the direction of the common council. The special term dismissed the proceeding upon the ground that Rawson street had become a public highway by dedication, but upon appeal the appellate division held that the erection of the fences on the 4th of June revoked the dedication.

*Arthur L. Andrews*, for appellant.

*W. Frothingham*, for respondent.

VANN, J. (after stating the facts). The undisputed evidence shows a clear intention on the part of Hunter and his successor in title to dedicate the land in question to the use of the public as a highway. He did not simply suffer it to lie open, unfenced and undefined, but by unequivocal acts he made a tender of dedication of land, fenced as a street, laid down upon his

Streets - Dedication How Shown.

own map as a street, and in constant use by the general public as a street. After he prepared the second map, and on the 10th of June, 1890, he conveyed abutting lots, bounding them on one side "by the west line of Rawson street," thus designating the open way on the map of 1889 as a street with that name. When the petitioner succeeded to his rights she did not attempt to revoke the dedication, but allowed matters to remain for five years as her husband had left them. Assuming, but not deciding, that the power of revocation existed when the ordinance of May 16, 1898, went into effect, no attempt had then been made to exercise the right. The tender of dedication was still open to acceptance by the city, and, if that ordinance amounted to an acceptance, the land forthwith became a public highway. As was said by this court in Cook *v.* Harris, 61 N. Y. 448, 454: "Dedication and acceptance may be proved by the acts of the parties and the circumstances of the case. The owner's acts and declarations should be such as to manifest an intention to abandon or devote his property to the specific public use. In the case of a highway, the public must accept the highway, and before such acceptance the dedication may be revoked. Such acceptance may be proved by long public use, or by the positive acts of the public authorities in recognizing and adopting the highway. No particular length of time is essential to make a dedication valid and irrevocable. The dedication and acceptance may both concur on a single day." See, also, 24 Am. & Eng. Enc. Law 6; Elliott, Roads & S. 89, 111; Dill. Mun. Corp. (4th Ed.) §§ 637, 638. By the charter of the city of Albany, the members of the common council are made commissioners of highways. Laws 1883, c. 298, tit. 3, § 14. Any action by the common council showing a clear intention to recognize the strip of land in question as a street was an acceptance of it as a public highway. An ordinance directing the street to be graded, paved, or put in proper condition for use by the public would have that effect. Flack *v.* Village of Green Island, 122 N. Y. 107, 25 N. E. 267; City of Cohoes *v.*

Same—Same—Tender of Dedication—Successors in Interest.

Same—Same—Acceptance.

Delaware & H. Canal Co., 134 N. Y. 402, 31 N. E. 887. A resolution formally and in terms accepting the street was unnecessary; for any official act on the part of the common council which treated it as a street, and showed an intention to adopt it as one of the public streets of the city, would be sufficient.

The ordinance of May 16th directed the construction of a sewer through the strip of land under consideration, calling it "Rawson Street," and treating it as a street, the same as various other public streets in the neighborhood through or across which the sewer was to run. Twice in the title and three times in the body of the act it is referred to as Rawson street, and recognized as a street, the same as Third street, Colby street, and Livingston avenue. The presumption, always in favor of official action, is that the common council, by directing a sewer to be constructed through it, did not intend to do an illegal act, or to trespass upon land belonging to another, but to treat it as the land of the city, in trust for use as a street. The proper authorities, by using it as a street, accepted it as a street. The ordinance was as clear an assertion of authority over the land as a street as if it had directed the street commissioner to grade or pave it. The common council thus did an act which it had no right to do, unless it had accepted, or thereby accepted, the land as a street. If the ordinance had declared that the city accepted the strip of land already fenced, thrown open to and used by the public as a street for years, the intention would not have been more unequivocal than as shown by the direction to construct a sewer in it as a public street, and calling it by the name by which it had been known to the public for many years, for that action necessarily adopted it as a street. In effect, the common council said, "We order a sewer to be built through the following streets of the city of Albany, and, among others, through Rawson street." It is true that the ordinance alludes to Rawson street "as declared by ordinance to be a public street." This may have referred to an ordinance passed, but not put in evidence, or it may have referred to an ordinance proposed for greater safety, but not yet adopted.

This does not detract from the necessary effect of the acts directed to be done by the ordinance in question, which involved the assertion of dominion over the land as a public highway. We think the ordinance was an acceptance of the street, and that upon its approval by the mayor, two days after its passage, Rawson street became a public highway, even if it had not become so before. We do not pass upon the effect of the first map prepared and filed by Mr. Hunter, his numerous conveyances of land with reference to it, the action of the city authorities in naming the street and constructing a cross walk in it, the public user, the change in 1875, and the acquiescence of all concerned therein. We place our decision upon the tender of dedication by Mr. Hunter in his lifetime, continued without interruption by the present owner for years after his death, and the acceptance of that tender, when still in full force, by the ordinance of May 16, 1898. Without reference to the earlier history of the street, we think this tender and acceptance were sufficient of themselves, independent of any other fact, to make Rawson street a lawful and irrevocable highway. When the street thus came into existence, the power to revoke the dedication was ended, and the attempt to exercise the power after acceptance by the city, through the erection of fences, was not a revocation, but simply a trespass. The courts below do not appear to have considered the effect of the ordinance of May 16th,—possibly, because counsel presented no claim with reference to the subject, as none was presented before us. While we regret that we have not the advantage of their views upon the question, we feel clear that the ordinance had the effect of an acceptance, by treating the land as already an existing street, and adopting it as such. The order of the appellate division should be reversed, and that of the special term affirmed, with costs in all courts.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, and CULLEN, JJ., concur. LANDON, J., not sitting.

Order reversed, etc.

MARTINS

*v.*

PEOPLE *ex rel.* ROCK ISLAND ATTORNEY.

(*Supreme Court of Illinois, June 21, 1900.*)

Quo Warranto—Judicial Discretion.—The granting of leave to file an information in the nature of a *quo warranto* is in the sound discretion of the court or judge applied to.

Same—Saloon License—Violation of City Ordinance—Remedies.—Under section 1 of chapter 112 of Hurd's Rev. St. of 1897 of Illinois, *quo warranto* is the proper remedy by which to test the validity of a saloon license claimed to have been issued in violation of a municipal ordinance.

Saloons—Licenses—Reasonableness of Ordinance.*—A city ordinance is not unreasonable nor void because it requires the consent of a majority of the freeholders of a block in which there is no liquor saloon before a license to keep such a saloon in the block shall be issued.

Same - Same—Discrimination.—The contention, that the ordinance in question attempts to discriminate between different blocks and between different parts and portions of the city, and between different persons having the same property interests, is without foundation.

Same—Same—Bond.—As respondent's license was void, it was unnecessary to determine whether his license bond was sufficient.

Fines—Appeal—Review.—The action of the trial court in fixing the amount of the fine, could not be reviewed on appeal, as the evidence upon the subject was not preserved and presented in a bill of exceptions.

Liquor Licenses—Franchises.— A license to keep a liquor saloon is not within the legal definition of a franchise.

APPEAL by respondent from Second district appellate court. *Affirmed.*

*Joseph L. Haas*, for appellant.

*Chas. J. Searle, State's Atty.* (*S. W. Odell*, of counsel), for appellee.

*See note at end of case.

Martins *v.* People *ex rel.* Rock Island Attorney

WILKIN, J. This is an appeal from the appellate court for the Second district, affirming a judgment of the circuit court of Rock Island county against appellant in a *quo warranto* proceeding begun in that court by the state's attorney of Rock Island county. The motion for leave to file the information stated that appellant claimed and was attempting to exercise the right to keep a dramshop under a license issued to him by the mayor of the city of Moline on November 4, 1898, contrary to the ordinances of said city and the statute in such case made and provided; that no petition, as required by the ordinances of the city, accompanied the application for license; and that no sufficient bond was filed by appellant as provided by law. The motion was supported by affidavits. Leave was granted, and the information filed. It appears from the allegations of the information that at the time the license was issued to appellant there was an ordinance in force in the city to the effect that in any block where no saloon then existed no license should be issued to keep a saloon there, without a petition, signed by two-thirds of the freeholders in such block, praying that such license be issued; that when the license in question was issued no saloon then existed in block No. 2 in South Moline, where the saloon was attempted to be licensed, and that no saloon had ever existed or been opened in said block; that no application in writing was made to the mayor as provided by the ordinances of said city, nor was any petition presented, signed by two-thirds of the freeholders in said block No. 2, praying for the issuing of such license, as provided by the ordinances; also, that the bond filed by appellant upon the issuing of the license was not in compliance with the ordinance of the city, in that it was not signed by two good and sufficient sureties who were at that date freeholders in Rock Island county. Appellant entered a motion to vacate the leave to file the information, supported by affidavits, but the motion was denied. A general demurrer was then filed to the information and overruled. Appellant electing to stand by his demurrer, the court entered a

Case Stated.

judgment of ouster against him, and imposed a fine of $250.

It is first contended that the circuit court should have denied the leave to file the information, for the reason that it was presented, not to subserve the public interests, but to gratify personal spite and prejudice, and for private and personal ends. The point is without substantial merit. As we said in People *v.* North Chicago Ry. Co., 88 Ill. 537: "The granting of leave to file an information in the nature of a *quo warranto* is in the sound discretion of the court or judge to which the application is made. Leave, on the one hand, is not granted as a matter of right upon the part of the relator; and, on the other hand, a court is not at liberty to arbitrarily refuse, but must exercise a sound discretion in accordance with principles of law,"—citing People *v.* Waite, 70 Ill. 25, and People *v.* Callaghan, 83 Ill. 128. From an examination of the affidavits filed in the case both by relator and the respondent, we are satisfied that the record fails to show any abuse of the discretion reposed in the court to permit the information to be filed.

Quo Warranto—Judicial Discretion.

The contention that the validity of a saloon license cannot be tested by an information in the nature of a *quo warranto* is also without merit; this court, in the case of Swarth *v.* People, 109 Ill. 621, having held it to be a proper remedy under section 1 of chapter 112 of Hurd's Revised Statutes of 1897. It is urged on behalf of appellant that the rule announced in that case does not apply here, because in this case the charge is a violation of a city ordinance, while in the case cited the violation was of a state law. The statute makes no such distinction; its language being that the petition may be filed when any person "shall hold or claim to hold or exercise any privilege, exemption or license, which has been improperly or without warrant of law issued or granted by any officer, board, commissioner, court or other person or persons authorized or empowered by law to grant or issue such privilege, exemption or license," etc. This case comes

Same—Saloon License—Violation of City Ordinance—Remedies.

clearly within the language of the statute, and no good reason is pointed out why the information should not lie.

It is said that the city ordinance requiring the consent of a majority of the freeholders of a block before the license can be issued is void, because unreasonable. The language of the ordinance is: "If the place so designated is in a block where no saloon then exists, then there shall accompany such application a petition of two-thirds of the freeholders in such block, praying that such license be issued." The question here is similar in principle to the one raised in City of Chicago *v.* Stratton, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84. The ordinance in that case provided that it should not be lawful to locate in any block, in which two-thirds of the buildings were devoted to exclusive residence purposes, a livery stable, "unless the owners of a majority of the lots in such block fronting or abutting on the street consent, in writing, to the location or construction of such livery stable." In commenting upon this provision of the ordinance, we there said (page 503, 162 Ill., page 855, 44 N. E., and page 87, 35 L. R. A.): "In determining the question of the location of a livery stable, the common council may properly consult the wishes and ascertain the needs of the residents of the block where the stable is to be kept, and to that end make their written consent the basis of the action of the commissioner of buildings in issuing the permit. In matters of purely local concern the parties immediately interested may fairly be supposed to be more competent to judge of their needs than any central authority,"—citing Cooley, Const. Lim. (6th Ed.) p. 138.

Saloons—Licenses—Reasonableness of Ordinance.

It is also said that this ordinance attempts to discriminate between different blocks and between different parts and portions of the city, and between different persons possessing the same property interests, and is therefore void. The language of the ordinance admits of no such construction. It is uniform in its operation. The ordinance being held valid, it follows that

Same—Same—Discrimination.

Note

the license issued to appellant is void: it being conceded it was issued contrary to the requirements of the ordinance. This view renders it unnecessary to discuss the question as to the sufficiency of the bond.

Same—Same—Bond.

As to the amount of fine imposed, the action of the trial court will not be disturbed. The record discloses the fact that evidence was heard upon that question; but it has not been preserved and presented in a bill of exceptions, and we are not in a position to say that it failed to justify the action of the court.

Fines—Appeal—Review.

The position of appellee, by cross error, that the appeal was improperly taken in the first instance to the appellate court, because a franchise is involved, is untenable. A franchise is defined to be "a special privilege conferred by the government upon an individual or corporation, which does not belong to the citizens of the country generally, by common right." 14 Am & Eng. Enc. Law (2d Ed.), p. 4. The term "franchise," as used in the statute providing that certain cases shall be appealable to this court, is used in its strict legal sense. A license to keep a saloon confers no special right or privilege upon the holder, but is merely one of the means adopted by the legislature for the regulation of the sale of intoxicating liquors; and such a license is not, therefore, within the legal definition of a franchise. Railroad Co. *v.* Dumbar, 95 Ill. 571. The judgment of the appellate court will be affirmed. Judgment affirmed.

Liquor Licenses—Franchises.

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NOTE.

Intoxicating Liquors—Licenses—Ordinance Requiring Consent of Adjacent Property Owners—Validity.—A statute prohibiting the granting of retail liquor licenses, except in incorporated cities or towns, unless there has been given the consent, in writing, of ten of the nearest *bona fide* residents, five of them being freeholders, does not contravene the provision of the 14th amendment of the U. S. Const. as to the equal protection of the laws. United States *v.* Ronan, 33 Fed. Rep. 117.

Note

Nor is such provision contravened by an ordinance requiring, as a condition precedent to the issuance of a liquor license, the consent, in writing, of a majority of the police board, and that, in case of a refusal by the board, the license shall be granted upon the written recommendation of not less than twelve citizens owning real estate in the block or square where the business is to be conducted, and such ordinance is a valid exercise of the police power of the state and city. Crowley *v.* Christensen, 137 U. S. 86, reversing in *Re* Christensen, 43 Fed. Rep. 243.

The provisions of the U. S. Const. as to interstate commerce are not involved by an ordinance requiring the permission of a majority of the police board and the consent of adjacent property owners as the condition precedent to issuing a liquor license. *Ex parte* Holmquist (Cal.), 27 Pac. Rep. 1099, following *Ex parte* Christensen, 85 Cal. 208.

An ordinance providing that as a condition precedent to obtaining a saloon license, the applicant should have the consent of a majority of the police board or of not less than twelve citizens owning real estate in the block or square was held invalid in *Re* Christensen, 43 Fed. Rep. 243, the court holding that an improper control of the liquor traffic was thereby delegated to the persons named.

So it was held in the case of Quong Woo, 13 Fed. Rep. 229, that a city ordinance which makes it unlawful for any person to establish, maintain, or carry on any laundry within certain limits in the city of San Francisco, without first having obtained the consent of the board of supervisors, which could only be granted upon the recommendation of not less than twelve citizens and taxpayers in the block in which the laundry is proposed to be established, and which punishes by fine or imprisonment for a violation of its provisions, is invalid; that under their authority to license trades and callings, supervisors cannot delegate their power to others, or make its exercise depend upon the consent of others.

In House *v.* State, 41 Miss. 737, the validity of a statute requiring a petition of a majority of the resident legal voters as a condition precedent to the granting of a license to sell liquor was upheld. Likewise one requiring a petition of a majority of the voters of a certain district. State *v.* Brown, 19 Fla. 563. And a statute requiring a petition of a majority of the legal voters in the ward. Groesch *v.* State, 42 Ind. 547. And one requiring a recommendation signed by a majority of the freeholders and householders of the ward or precinct where the saloon is to be located. Jones *v.* Hilliard, 69 Ala. 300. And also one requiring a petition of a majority of the female citizens over eighteen years of age and a majority of the male citizens over twenty-one years old. Rohrbacher *v.* Jackson, 51 Miss.

State *ex rel.* Conrad *v.* Mayor, etc., of New Orleans

735. In *Re* Bickerstaff, 70 Cal. 35, it was held that an ordinance requiring the applicant to present a certificate signed by five persons and to have his moral character reported on by designated city officials was not invalid as a delegation of power.

An ordinance requiring the applicant for a liquor license to obtain a written recommendation from four of his nearest neighbors as a condition precedent to receiving a license is within the charter powers of a city. Whitten *v.* Covington, 43 Ga. 421.

An ordinance requiring a person desiring to erect a livery stable to obtain the consent in writing of the owners of a half of the real estate in the block where the building is to be erected before a building permit will be granted was held invalid. St. Louis *v.* Russell, 116 Mo. 248.

But in Chicago *v.* Stratton, 162 Ill. 494, the court sustained the validity of an ordinance providing that "it shall not be lawful for any person to locate, build, construct, or keep in any block in which two-thirds of the buildings are devoted to exclusive residence purposes, a livery, boarding, or sales stable . . . within 200 feet of such residence, on either side of the street, unless the owners of a majority of the lots in such block fronting or abutting on the street consent in writing to the location or construction of such livery stable."

An ordinance prohibiting the granting of a retail liquor license in a certain district of a city, unless the person applying shall present to the mayor with his application a petition signed by a majority of the legal voters of such district asking for the granting of such license, is not void on the ground that it delegates to the voters the power to issue licenses, nor on the ground that it permits them to discriminate arbitrarily between applicants. Swift *v.* People, 162 Ill. 534.

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## STATE *ex rel.* CONRAD *et al.*

*v.*

## MAYOR, ETC., OF NEW ORLEANS.

(*Supreme Court of Louisiana, June 4, 1900.*)

**Election of Councilmen—Constitutional and Statutory Provisions.**—Article 319 of the constitution contemplates that the electors of the city of New Orleans shall choose the officers charged with the exercise of police power, and with the administration of the affairs of

State *ex rel.* Conrad *v.* Mayor, etc., of New Orleans

said city, in whole or in part (subject only to such exceptions as may be found in the constitution itself), when vacancies occur, as well as at other times; and section 79 of Act No. 45 of 1896, the operation and effective force of which was at that time suspended, "ceased" entirely upon the adoption of the higher law, by reason of its antagonism thereto, and never thereafter took effect, so that section 56 of Act No. 20 of 1882 remained unrepealed, and is the present law providing the mode of filling vacancies in the council of New Orleans.

**Same—Mandamus to Mayor.***—A *mandamus* will lie to the mayor and council to compel the ordering of an election to fill a vacancy in the council as provided by said section.

(Syllabus by the Court.)

APPEAL by plaintiffs from parish of Orleans civil district court. *Reversed.*

*George J. Untereiner*, for appellants.

*Samuel L. Gilmore*, for appellees.

MONROE, J. The relators in this case are qualified voters and taxpayers of the Tenth ward of the city of New Orleans. They allege that at the municipal election held upon November 7, 1899, councilmen were elected to represent the different wards or representative districts of the city, and that, among them, Ferdinand Reusch, Jr., was elected to represent the Tenth ward, but that said Reusch was thereafter interdicted, and was for that reason, and is now, unable to qualify, and that the Tenth ward is therefore without a representative in the municipal council. They further allege that they have presented a petition to the mayor, representing that they and the other qualified electors of said Tenth ward have the right, under articles 319 and 320 of the constitution, to elect a representative in place of said Reusch, and that they have presented a petition to the mayor praying that an election be ordered for the purpose, but that the mayor has declined to comply with said prayer, and has informed relators that a substitute for or successor to said Reusch would be elected by the other members of the council, and that relators are informed and believe that such action will be taken by said members of the council, claiming to

Case Stated.

*See note at end of case.

act under the authority of section 79 of Act No. 45 of 1896. Relators further allege that said section is, and has always been, without legal effect, for the reason that it was repealed and annulled by the constitution of 1898, and is in contravention of articles 319 and 320 of said constitution. Relators further allege that the proposed action of said mayor and council will leave the Tenth ward, which is one of the most populous in the city, without representation in the municipal legislative body which is vested with power to levy taxes and disburse the same, and otherwise administer the government thereof, and that they are entitled to the writ of *mandamus* to compel the said mayor and council to order an election in said ward, to the end that such want may be supplied. By supplemental petition, relators aver that they were in error in alleging that Ferdinand Reusch, Jr., had been interdicted but that the fact is that he was insane before the election, and has been so ever since, and is confined in a retreat, and that proceedings for his interdiction have been filed, and a temporary curator appointed, and that a committee of the council has reported that he is notoriously insane, and that a vacancy exists in the office to which he was elected. The mayor of New Orleans and the members of the city council, for answer and return, admit that Ferdinand Reusch was elected to the council to represent the Tenth ward, as alleged; that he is notoriously insane; that a vacancy exists in the office to which he was elected; that the Tenth ward is without a representative in the council; and that the vacancy should be filled. They further admit that the council was about to fill such vacancy in the manner provided by section 79 of Act No. 45 of 1896 (the charter of the city); *i. e.* by the election *viva voce* by the other members of the council of a citizen having the qualifications required for the office. They allege that there is no law making it their ministerial duty to order an election as prayed for by the relators, but that it is made their ministerial duty, by the law under which they propose to act, to fill said vacancy in the manner contemplated; that article 319 of the constitution has no application to vacancies

in public offices in New Orleans; that article 171 provides that the general assembly shall determine how all vacancies shall be filled; that section 79 of Act No. 45 of 1896 makes such provision with reference to the office in question, and has not been repealed or annulled, and, in the absence of any other law, is continued in force by article 325 of the constitution. Respondents further aver that the civil district court is without jurisdiction *ratione materiæ*, and they pray that relators' application be dismissed. The facts as thus set forth in the pleadings are admitted, and this court is called upon to deal only with the controverted questions of law which are presented. The objection to jurisdiction does not appear to have been urged in the court *a qua*, is not urged here, and is presumably abandoned. Section 79 of the present city charter (Act No. 45 of 1896) reads as follows, to wit: "Sec. 79. Vacancies occurring in the office of councilmen or recorder shall be filled by election, *viva voce*, by the council, of a citizen having the qualifications required for such office, and such person shall serve for the unexpired term of the office." At the time that this law was adopted (July, 1896) the affairs of the city were administered by officers who had been elected in April, 1896, agreeably to the provisions of the then existing charter (Act No. 20 of 1882), and who were to hold office for four years. Under that charter provision was made for filling vacancies in the council as follows: "Sec. 56. Vacancies occurring among the councilmen shall be filled at once by election. In such a case, it shall be the duty of the mayor, and, in case of failure on his part, of the council, to at once order an election to fill the same; said vacancy to be filled in the same manner and by the same constituency that had elected the former holder of a seat in said council." In 1898 a vacancy occurred in the council by reason of the resignation of one of the members, and it was proposed to fill it by *viva voce* election by the council, as provided in the act of 1896; but some of the constituents of the member who had resigned applied, as the relators in this case have done, for a *mandamus* to compel the ordering of an elec-

tion under the act of 1882. In considering the case thus presented, this court found (comparing and construing the two acts together) that the provision in the act of 1896 as to the manner of filling vacancies in the office in question was not intended to apply to offices which had been originally filled by election under the act of 1882, but that its operation was suspended until the expiration of the terms of such offices, and that vacancies occurring during such terms were to be filled in the manner prescribed by the act of 1882, and the *mandamus* was made peremptory. The language of the opinion was in part as follows, to wit: "So long, therefore, as the present council holds office, vacancies occurring therein are to be filled pursuant to the provisions of the old law; and section 79 of the act of 1896, providing a different mode of filling vacancies, is held suspended in its operation until the happening of the condition that alone can give it potency and force, *viz.* the election of a new council under the provisions of the present municipal charter." In reaching this conclusion, however, it was stated in the opinion that the question of the constitutionality of the mode of filling vacancies provided by section 79 of the act of 1896 was pretermitted, as unnecessary to the decision of the case. State *ex rel.* Kinberger *v.* City of New Orleans, 51 La. Ann. 99, 24 South. 620. It follows from this that the section in question, while a law in some sense (unless void by reason of its contravening the constitution of 1879), was without force or effect, and was condemned to remain in a condition of suspended vitality until after the election as provided by the city charter of 1896; and that election having now been held, and the vacancy which it is proposed to fill having occurred among the officers thus elected, said section must find its application, unless the question, of constitutionality, which was pretermitted in the Case of Kinberger, stands in the way.

The members of the present city council, though elected in November, 1899, by virtue of the express provisions of the constitution (article 207) were inducted into office in May,

1900, and will hold the same for four years from the latter date. The council is a body composed of one member from each of the 15 representative districts into which the city is divided, and two additional members, elected at large from the First and Fourth municipal districts, respectively. The Tenth ward, constituting the Tenth representative district, is situated in the Fourth municipal district, and is entitled to one representative, to be elected by the qualified voters of the ward, and who must be an actual resident within its limits, and to further representation by the councilman elected at large for the Fourth municipal district, who may be a resident of either of the three wards composing that district. It is admitted that there is a vacancy in the office of councilman for the Tenth ward, resulting from the inability to qualify of the person who was elected, and, as no other election has ever been held under the present law and the present subdivision and assignment of representatives, it follows that the office has never been filled; and it also follows that, if it is filled in the manner proposed by the respondents, the citizens and electors of the Tenth ward will for the next four years labor under the disadvantage of being governed, so far as municipal affairs are concerned, by a legislative body composed of members choosen by other constituencies, together with a member elected by the others to represent them; in other words, that they will be denied the right to choose their own representative, except in so far as it may be said that they exercise that right in choosing the representative from the Fourth municipal district. This is as much a denial of representation as though the members of the general assembly from one parish were elected by those from the other parishes, or as though the members of congress from one state were elected by those from the others; and it amounts to no representation at all, since no people can be said to be represented, in the sense in which the term is understood for the purposes of a republican government, who have no voice in the selection of the person designated to represent them, and especially is this true where that person is selected by

those having, perhaps, conflicting interests to subserve. The question then is, does the legislation relied on effect this result?

Mention of Constitutional Conventions, and Explanatory Provisions.

Prior to the adoption of the present constitution the authority of the general assembly with respect to the establishment of municipal corporations generally was, no doubt, very extensive; but there has been a saving clause in all the constitutions of this state, with the exception of that of 1868, whereby certain rights have been reserved to the people of New Orleans, and that clause was distinctly broadened and made more effective by the convention which adopted the present constitution, in which are to be found the following provisions, to wit: "Art. 319. The electors of the city of New Orleans, and of any political corporation which may be established within the territory now, or which may hereafter be, embraced within the territorial limits of said city, shall have the right to choose the public officers who shall be charged with the exercise of the police powers, and with the administration of the affairs of said corporation, in whole, or in part." Article 320 excepts from the operation of the foregoing provisions the board of liquidators of the city debt, and boards or commissions, the members of which may be elected by the council or appointed by the mayor, as also certain other boards. There is no exception, however, in regard to the members of the council, and it is a significant fact that the article cited above is broader, and at the same time more specific, than that which was contained in the constitution of 1879, in that article 253 of the constitution of 1879 secures to the citizens of New Orleans the right to appoint "the officers necessary for the administration of the police of said city pursuant to the mode of election which shall be provided by the general assembly," while the present article provides that the "electors * * * shall have the right to choose the public officers who shall be charged with the exercise of the police powers and with the administration of the affairs of said corporation in whole or in part"; the clause

reading, "pursuant to the mode of election which shall be provided by the general assembly," being omitted. A reason for these changes may readily be found in the fact that it had not been altogether settled how far the reservation of right under the terms of the preceding constitutions extended beyond officers "necessary to the administration of the police," giving to the word "police" a restricted signification. Hence in the new constitution the language, "charged with the exercise of police power, and with the administration of the affairs of said corporation, in whole or in part," was used. Again, the last clause of article 253 of the constitution of 1879 ("pursuant to the mode of election which shall be provided by the general assembly") led to the conclusion that what the citizens of New Orleans were reserved the right to do could, under the authority of the general assembly, be as well and as lawfully done by a council, the members of which had been elected by such citizens; and hence it was held that the city council could properly elect and re-elect the members of the board of police commissioners. State *v.* City of New Orleans, 41 La. Ann. 156, 6 South. 592. In the new constitution, therefore, the language upon which that construction was based was omitted, so that the officers, with the exceptions specifically mentioned, are to be chosen by the electors themselves, and not by their representatives in council assembled. It will be remarked that nothing appears in the article which we are considering as to the mode of filling vacancies. It certainly will not be denied, however, that a person who goes into the council to take the place of one who, having been legally elected, is unable to qualify, and who participates in the official action of that body, is "an officer charged with the exercise of the police power, and with the administration of the affairs" of the corporation, within the meaning of the constitution. And, for the purposes of the question of the right of the electors, whom he is supposed to represent, to a voice in the selection of such person, it is wholly immaterial whether he goes into the

office to fill a vacancy occasioned by sickness, death, or resignation, or to fill a vacancy occasioned by the expiration of the term of his predecessor, or to fill an office newly created, and to which no one has ever previously qualified. In the instant case the office of representative from the Tenth ward, as created by the act of 1896, has never yet been filled by any one; and, if it is now filled in the manner proposed by the respondents, the incumbent will occupy the unique position of serving out the entire term of an office which has been vacant from the beginning of its creation, of representing a constituency who will have had no voice in his selection, and, without having been so chosen, of participating in the administration of the affairs of a city, the electors of which have the constitutional right to choose all officers discharging such functions.

As a matter of course, there might be other articles in the constitution, besides article 320, which it would be necessary to interpret with article 319. In fact, we have found that to be the case. Thus, article 157 provides that "vacancies occurring from any cause in the judicial offices in the parish of Orleans, shall be filled by appointment of the governor, by and with the advice and consent of the senate," etc. And, when it became necessary to reconcile this article with article 319, it was held that it should be simply read into the latter article, as an exception to the rule there laid down that officers shall be chosen by the electors. Both articles relate to the same subject-matter, to wit, the manner of selecting officers in the city of New Orleans. The one is general in its terms, and embraces all officers exercising certain general powers, as also the mode of filling the offices held by them. The other is particular and specific, and applies only to certain among the officers included in the general provisions, and only to the mode of filling the offices held by them, in cases of vacancy. There was no difficulty, therefore, in giving to each article its proper application; the general provisions of the one being, *pro tanto*, modified by the particular provisions of the other. It is proper to say, in

this connection, and in justice to our learned Brother of the district court, who has denied the application of the relators, partly, perhaps, by reason of an unguarded expression in the opinion in the matter of State *v.* Grandjean, 51 La. Ann. 1102, 25 South. 940, that the immediate question then being considered related to the filling of a vacancy in a judicial office in the city of New Orleans, for the purposes of which articles 157 and 319 were construed, and it was said that the sole function of article 157 was to provide therefor, whilst article 319 did not "deal with or mention vacancies at all." The more correct way of stating it would, no doubt, have been to say that the application of article 157 was particular and specific as to the question at issue, and that of article 319 general, and hence that the former controlled in the case then before the court. The learned counsel for the respondents argues that these familiar rules of interpretation should be applied in construing together articles 319 and 171, which latter article reads, "The general assembly may determine the mode of filling vacancies in all offices, for the filling of which provision is not made in this constitution." But, in order to arrive at the conclusion upon which he insists, the rules invoked would have to be inverted. Article 171, as compared with article 319, is general, while article 319 is particular. The one refers to all vacancies throughout the state not otherwise provided for. The other refers to the filling of offices of a certain character in the city of New Orleans alone, and is couched in language which carries the conviction that it was the intention of the framers of the constitution to secure to the electors of that city, themselves, the right, under any and all circumstances, to choose the persons to fill those offices. If there could be any doubt upon this subject, it would be removed by recalling the fact that the convention of 1898 studiously omitted from the present constitution the concluding language of article 253 of the constitution of 1879, under which it had been held that the general assembly might vest the power

to make such choice in a council elected by the people, and that a choice by such counsel was equivalent to a choice by such electors, and also by considering that article 320 of the present constitution specially provides, as exceptions to the rule laid down in article 319, for cases in which certain officers (members of boards or commissions) may be elected by the counsel, or appointed by the mayor with the consent of the council.

It is said that the electors of the Tenth ward should not be allowed to choose a representative, because article 207 of the constitution provides that, "in the city of New Orleans, parochial and municipal elections shall be held on the Tuesday following the first Monday of November, 1899, and every fourth year thereafter," and that there is no authority for holding an election for municipal officers in the meanwhile. This article refers to the general parochial and municipal elections, and has no application to the filling of vacancies.

It is further argued that the vacancy must be filled agreeably to the provisions of section 79 of the present city charter, because there would otherwise be no law under which action could be taken, and without such law article 319 of the constitution would be inoperative; and we are referred to the third paragraph of article 325 of the constitution, which reads, "The provisions of all laws which are inconsistent with this constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this constitution as require legislation to enforce them shall remain in full force until such legislation is had." For the reasons which have been stated, section 79 of Act No. 45 of 1896 is inconsistent with the present constitution, and therefore "ceased" upon the adoption of that instrument, if the word "ceased" can be properly applied to a statutory provision which had never become operative, and it could now be given effect only upon the theory that article 319 requires legislation for its enforcement. But the conditions existing at the date of its adoption

were such that article 319 requires no such legislation. The city of New Orleans was then provided with a form of government under which the officers referred to therein were elected as contemplated by the article, and under which, as was decided in the Kinberger Case, vacancies in such offices were required to be filled in the same manner. The law applicable to the latter subject, and the only law then actually in force, was section 56 of Act No. 20 of 1882. This court said upon that subject in the case mentioned: "So long, therefore, as the present council holds office, vacancies occurring therein are to be filled pursuant to the provisions of the old law; and section 79 of the act of 1896, providing a different mode of filling vacancies, is held suspended in its operation until the happening of the condition that alone can give it potency and force, *viz.* the election of a new council under the provisions of the present municipal charter." Section 56 of the act of 1882 had not then been repealed, and its repeal would have been effected by section 79 of the act of 1896 only when the latter became operative, to wit, after the municipal election in November, 1899. In May, 1898, however, the present constitution was adopted, and said section "ceased," by reason of its antagonism to that instrument, even assuming that it was not void *ab initio* by reason of antagonism to article 253 of the constitution of 1879. It has, therefore, never taken effect, and section 56 of the act of 1882 is still in force and unrepealed; and, its provisions being plain and mandatory, they should be complied with. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the relators, directing the issuance of a peremptory writ of *mandamus* commanding the respondent the mayor of New Orleans, and, in the alternative, the council of the said city, to order an election, agreeably to the provisions of section 56 of Act No. 20 of 1882, to be held in the Tenth ward of said city, to fill the existing vacancy in the office of councilman from said ward.

Same—Mandamus to Mayor.

**It is further ordered, adjudged, and decreed that the respondents pay the costs of this proceeding.**

NOTE.

**Elections—Mandamus to Municipal Officers to Compel Holding of.**—When it is clearly the duty of officers of a municipal corporation to call an election, *mandamus* will lie to compel them to perform such duty. State *v.* Young, 6 S. Dak. 406; People *v.* Common Council, 85 Cal. 369, 24 Pac. 727; Regina *v.* Mayor of Bradford, 4 Eng. Law & Eq. 194; Sansom *v.* Mercer, 68 Tex. 488; State *v.* Twenty-second District Judge, 35 La. Ann. 637; Attorney General *v.* City Council of Lawrence, 111 Mass. 90; McConihe *v.* State, 17 Fla. 238; Gibbs *v.* Bartlett, 63 Cal. 117; State *v.* Holden, 19 Neb. 249; People *v.* Town of Fairbury, 51 Ill. 149; Lamb *v.* Lynd, 44 Pa. St. 336; Demarest *v.* Wickham, 63 N. Y. 320; King *v.* Mayor of Grampond, 6 T. R. 301; *Re* West Sussex County Council, 65 L. J. Q. B. N. S. 184, 73 L. T. Rep. 566; State *ex rel.* Rutledge *v.* St. Louis School Board, 33 S. W. Rep. 3, 131 Mo. 505; Lewis *v.* Marshall, 16 Kan. 102; People *v.* Common Council of Brooklyn, 77 N. Y. 503; Glencoe *v.* People, 78 Ill. 382; Regina *v.* Pembroke, 8 Dowl. P. C. 302; State *v.* Rahway, 4 Vroom (N. J.) 110.

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## SKANEATELES WATERWORKS CO.

*v.*

## VILLAGE OF SKANEATELES *et al.*

(*Court of Appeals of New York, Dec. 5, 1899.*)

**Water Supply—Acquisition of Property of Water Company—Statute.**—Under Laws of 1873 of New York, c. 181, villages are authorized to supply their inhabitants with water; and in section 227, the act provides that they may, "if it shall become or be deemed necessary by the board of water commissioners," acquire the property and privileges of existing water companies by condemnation proceedings. *Held*, that it is left to the discretion of such boards whether or not such property shall be acquired.

**Water Companies—Exclusive Franchise—Construction of Grant.***—A municipal grant of a franchise to a water company to maintain and operate a system of waterworks for furnishing the municipality

*See *note*, 3 Mun. Corp. Cas. 427 *et seq.*

and its inhabitants with water is to be strictly construed, and is not exclusive, unless it is expressly so provided.

**Same—Franchises as Contracts—Constitutional Law.***—Such a franchise is a contract, and may not be lawfully destroyed or impaired.

**Same—Same—Same.**—Such statute, and the acts amendatory thereto, so far as they authorized the defendant village, as plaintiff's competitor, to tax plaintiff and other abutting property owners in the event that the net water receipts from defendant's system were not sufficient to pay interest and principal as they became due, and thus to compel plaintiff to contribute towards the cost of the construction and maintenance of the waterworks of the village, and enabling the latter to devise a system of water taxes by which taxpayers who were customers of plaintiff might be discriminated against, and compelled, through self-interest, to cease taking water from plaintiff, and to take that of defendant instead, are in contravention of section 10 of article 1 of the federal constitution, and, therefore void.

**Same—Same—Statutes—Effect of Void Provisions.**—Such provisions of the statutes and the amendatory acts do not constitute an essential feature thereof, and are separable from their valid provisions.

APPEAL by plaintiff from Fourth department appellate division supreme court. *Affirmed.*

*Charles A. Hawley* and *George Barrow*, for appellant.
*Wm. G. Tracy* and *M. F. Dillon*, for respondents.

PARKER, C. J. The plaintiff, a domestic corporation organized pursuant to the provisions of chapter 737 of the Laws of 1873, and the acts amendatory thereof and supplemental thereto, brought this action for the purpose of obtaining a permanent injunction against the village of Skaneateles, its president, trustees, and water commissioners (whom, for convenience, we shall refer to in the course of this opinion as the village), restraining them from constructing and operating in the village of Skaneateles an independent system of waterworks, for the purpose of supplying it and its inhabitants with water. Such steps were taken on or about the 5th day of April, 1887, by the village of Skaneateles, as, in conjunction with the acts of the plain-

Case Stated.

*See Michigan Tel. Co. *v.* City of St. Joseph (Mich.), *ante*, p. 261, and *note*, p. 270.

tiff, operated to vest in the latter a franchise to maintain and operate within its corporate limits a system of waterworks for furnishing to the village and its inhabitants pure and wholesome water upon certain terms and conditions, which, in effect, were that the company should have its works in general operation by the 1st day of December, 1889; that it should not charge or collect at any time a greater sum than $40 per annum for each hydrant; that at such rate it should furnish all the hydrants required by the village, and should not sell or transfer to nonresidents of Skaneateles the rights acquired by the granting of the franchise. The works were not completed within the time provided for, but before the expiration of such period the trustees of the village of Skaneateles passed a resolution extending the time for the completion of the works until December 1, 1890, and declared that thereby the franchise theretofore granted to the plaintiff was renewed. Within the period of time designated by the latter resolution the works were completed, and the plaintiff commenced to supply the village and its inhabitants with water, and so continued under its contract for a period of about five years, at which time the contract with the village expired, and was not renewed. Whether the record discloses the real reason for the refusal of the village to renew the contract is open to doubt, but the evidence indicates that the plaintiff, having found that it had lost money, foolishly asked for $10 more per hydrant than it was entitled to charge under the terms of the grant by which the franchise was created. This was the first mistake, but not the only one, in the chapter of errors which led to the appointment of a board of water commissioners, in pursuance of chapter 181 of the laws of 1875, who thereupon took the necessary steps to have a special election held for the purpose of voting upon the proposition to construct an independent system of waterworks for the village. The vote was largely in favor of an independent system, and the water commissioners proceeded at once to secure such a system. The situation presented to the water commissioners is described in the findings of the learned

referee as follows: "The system of waterworks so constructed and completed as aforesaid by plaintiff was, and at all times since has been, and now is, a complete and adequate system. Said corporation has laid pipes in substantially every street of said village. No complaint has been made that the water furnished by said plaintiff has not been pure and wholesome, or that the sufficiency thereof has not been adequate, or that the pressure thereof has not been adequate for fire protection and all other purposes." They further say that the source from which the plaintiff obtained its water, namely, Skaneateles Lake, was the only source from which water could be obtained for supplying and furnishing the village and its inhabitants with pure and wholesome water. Necessarily, therefore, it was apparent that the public health could not be advantaged by an additional system of waterworks, and that there were no public interests requiring it; and, as the statute under which the village was proceeding to acquire a system of waterworks of its own permitted the acquisiton of the plaintiff's waterworks, rights, and franchises by condemnation proceedings, it would seem to the average mind that common fairness, if not common honesty, should have dictated that course. It is true that the village offered to pay to the plaintiff $24,000 for its property, a property mortgaged for $50,000, but the plaintiff declined to take that sum, and instead requested the defendant to take its property by condemnation proceedings, as the statute authorized. So anxious was the plaintiff to have that course taken that it even offered to pay all the expenses of such a proceeding, except the defendant's counsel fees; but the village would not avail itself of the permission of the statute, or of the invitation of the plaintiff, and, for an excuse for such an unconscionable performance, says that it might have been compelled by a proceeding in court to pay to the plaintiff something more than the actual cost of duplicating its works. In other words, it feared that the court might hold that the franchise had some value, and that the money lost during the years required to educate the people

up to the desirability of taking water should be compensated for.

It is the experience of all attempts to introduce water into villages and small cities that the number of individual patrons at the outset is very small, because their houses are not piped, and they are without bathtubs and other appliances which go with the use of water supplied under pressure. The houses erected after the construction of waterworks are, of course, made ready for connection with the pipes of the company, but the old houses are brought in very slowly. Many never come in, while a small percentage of the others are brought in each year, as the owners find themselves able to enjoy the luxury afforded by the water system, or as they may be persuaded that the necessary expense ought to be incurred for reasons of health or comfort. This means, in almost all cases, losses for the first few years, until a sufficient number of people have become patrons to put the plant on a paying basis. The theory of the defendant seems to be that the proper way to treat such a corporation as the plaintiff, promoted in this instance, as it appears, by defendant's citizens, is to let it go on and build waterworks, losing money each year while it educates the people up to the point of using the water, until years have passed away, and the plant has at last come to a paying basis, and then duplicate its plant, and take over a paying business, for the simple cost of the construction of new works, and it claims the permission of the legislature to take that very course. On the other hand, the appellant urges that the statute authorizing villages to supply themselves with water, and permitting the acquisition of the works of any private corporations that may be supplying such municipalities with water, also makes it the duty of the water commissioners to acquire the property of the existing corporation or corporations. But, after a very careful examination of the statute, it seems to us very clear that this is not so.

Water Supply—Acquisition of Property of Water Company—Statute.

It is probable that the legislature mistakenly assumed that

such authorities would not act unjustly or oppressively, but would recognize the property rights of others. Be that as it may, the right to determine whether the property of an existing waterworks corporation should be taken or not is clearly submitted to the determination of the local authorities. The refusal of the defendant, therefore, to acquire the plaintiff's property by proceedings *in invitum* does not tend to support the plaintiff's claim for an injunction. The defendant has done precisely what the statute authorizes, and all that remains for the court to determine is whether the act was within the legislative power, or void, because in contravention of the organic law.

Our first inquiry naturally is as to the nature of the rights acquired by the plaintiff under and by virtue of the franchise granted to it. The answer is readily to be found in the decisions of this court in Syracuse Water Co. *v.* City of Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546, and in *Re* City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270. Water Companies—Exclusive Franchise—Construction of Grant.

Indeed, the principle was settled in the Charles River Bridge Case, 11 Pet. 548, 9 L. Ed. 773, where it appeared that the legislature of Massachusetts, after passing an act incorporating the plaintiff for a term of years, with power to erect a bridge and collect the tolls, etc., subsequently incorporated the defendant, with power to erect another bridge very near the first. The act provided that, after the expense of the construction of the first bridge had been reimbursed to its promoters, it should be surrendered to the state, and become a free bridge. It was insisted that the act incorporating the defendant impaired the obligation of the contract between the state and the plaintiff, and was therefore in violation of section 10 of article 1 of the constitution of the United States, providing that no state shall pass any law impairing the obligation of contracts. While the court was divided upon the question whether there could be implied from the contract on the part of the state an agreement not to authorize, contiguous to that of the Charles river bridge, another bridge,

which would ultimately become free, and thereupon render the plaintiff's bridge of little or no value, the majority of the court agreed that the contract between the state and the plaintiff was not exclusive, and that an agreement not to authorize the erection of another bridge could not be implied by reason of the settled rules of construction of statutes adopted under the system of jurisprudence which we have derived from the English law, *viz.* that public grants are to be construed strictly, so as to prevent rights from being taken from the public, or given to a corporation, beyond those which the words of the grant, by their ordinary construction, convey. The doctrine of that case has been accepted by this court, and frequently applied, as in Plank-Road Co. *v.* Douglass, 9 N. Y. 444; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87; Power *v.* Village of Athens, 99 N. Y. 592, 2 N. E. 609; Syracuse Water Co. *v.* City of Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; and *In re* City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270.

In the Syracuse Case, the plaintiff was incorporated by chapter 224 of the Laws of 1849, for the purpose of furnishing water to the city and its inhabitants, and this it did from the time of its creation down to about the time of the commencement of the action, which was brought for the purpose of restraining the defendant, the city of Syracuse, from granting to the Central City Water Company the right to place pipes and other constructions in the city of Syracuse with the view to supply it and its inhabitants with water. The plaintiff's charter provided that it should, when requested, furnish water to the common council of the city for the extinguishment of fires and other purposes, on terms to be agreed upon between them, and, in case they should not agree, a provision was made for a determination of the disagreement by commissioners to be appointed by the supreme court. The charter also provided that any time after the expiration of the 20 years the common council should have the right to assume all the property rights, powers, and franchises of the company, on paying to it an amount to be ascertained by a

method prescribed. For nearly 40 years the Syracuse Water Company continued to furnish water for the city and its inhabitants, and then, in pursuance of chapter 85 of the Laws of 1880, the Central City Water Company was incorporated, and in its articles of incorporation the object of its creation was declared to be to supply the city of Syracuse and adjacent villages with pure and wholesome water for domestic use, for fire protection, and other public purposes. The common council of the city thereupon adopted a resolution authorizing such company to construct and operate waterworks in the city of Syracuse for the purpose of supplying it and its inhabitants with water. It was contended by the Syracuse Water Company in this court that the provision in the grant requiring the company, on request, to furnish water to the municipality, was, in legal effect, requiring the company to furnish, and the city to take, water for fire and other public purposes; but it was decided otherwise. The grant to the water company was held to give to it the privilege of supplying all the water that the city or its inhabitants might wish to take, but not with the right to supply them all the water that they might care to use.

The doctrine of that case was adopted and approved in *Re* City of Brooklyn, *subra*, which was a special proceeding instituted for the purpose of acquiring the property and franchises of the Long Island Water Supply Company. The commissioners of appraisal refused to hold that such company had an exclusive right to furnish water to the territory supplied by it. This position was sustained in this court, on the ground that the franchise granted was not exclusive.

Under the settled law of this state, therefore, the franchise that the plaintiff here acquired was not exclusive, and did not prevent the village from proceeding under the act of 1873, and the acts amendatory thereof, to grant a franchise to another corporation to construct waterworks in the village, and at the same time contract with it to take such water as the village should need for fire protection and other public purposes. Indeed, the appellant concedes this to be so, but

at the same time insists that the attempt of the village to perform such service for itself presents a very different question; for while the effect of granting a franchise to another corporation might be to impair, and possibly ultimately to distroy, the value of its plant, the construction and operation of waterworks by the village, it is argued, necessarily has that effect, because it takes away the power of the company to supply the village, the latter having placed itself beyond the necessity of being thus supplied; and, the village having also undertaken the business of supplying its inhabitants, the power of the company to supply them is at least impaired, and hence it is urged that the obligation of its contract is impaired, within the meaning of the federal constitution.

All franchises come from the state, although the legislature may, and often does, delegate to municipal authorities the right to take final action in the procedure resulting in the creation of a franchise. Ghee *v.* Gas Co., 158 N. Y. 510, 513, 53 N. E. 692. The effect of such action, if within the legislative permission, is to allow the grantee to carry on the business authorized by the franchise. All rights not expressly granted by it are, as we have seen, reserved. The rights thus reserved include in part the granting of a franchise to another corporation to carry on the same business in the same territory. The power to grant the additional franchise, as well as the first one, the municipality acquires from the legislature, which has the power to determine whether the rights reserved upon the grant of the first franchise shall be exercised by a private corporation or by the municipal corporation. It may well be that competition by the municipality more seriously affects the earning capacity of the private corporation than would the competition of another private corporation; but the test of legislative power in such case is not whether the agency selected to construct and operate competing waterworks is effective or otherwise, but whether the statute providing for the agency also contains provisions assisting it to impair or destroy the property of the private corporation by other means than competition.

We are thus brought to an examination of the statutes, and our first inquiry will be whether they merely threaten parties in the plaintiff's situation with the consequences of local municipal competition, or constitute an invasion of their grants. The former, as we have seen, is permissible. But the latter may not be done; for the doctrine has been settled since the Dartmouth College Case, 4 Wheat. 518, 4 L. Ed. 629, that a grant of corporate powers by the sovereign to an association of individuals for public use constitutes a contract, within the meaning of the federal constitution prohibiting a state legislature from passing laws impairing its obligations. In the recent case of Pearsall *v.* Railway Co., 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 834, the court, after a brief review of the Dartmouth College Case, said: "Subsequent cases have settled the law that, wherever charter rights have been acquired by virtue of the corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation." Intermediate the cases cited there are many cases in the supreme court of the United States in which the doctrine referred to has been either asserted or made the basis for the decision, as in New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing & Manufacturing Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Waterworks Co. *v.* Rivers, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; Louisville Gas Co. *v.* Citizens' Gaslight Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510. These were cases where the grants were of an exclusive right to supply gas or water to a municipality. That court has taken frequent occasion to assert the inviolability of corporate charters in cases respecting the power of taxation, and, in a series of decisions extending over many years, has held that a clause in the contract imposing certain taxes in lieu of other taxes, or all taxes to which the stockholders would be subject, is impaired by legislation raising the rate of taxation or imposing taxes other than those specified in the charter. New Jersey *v.*

Same—Franchises as Contracts—Constitutional Law.

Wilson, 7 Cranch 164, 3 L. Ed. 303; Bank *v.* Knoop, 16 How. 369, 14 L. Ed. 977; Dodge *v.* Woolsey, 18 How. 331, 15 L. Ed. 401; McGee *v.* Mathis, 4 Wall. 143, 18 L. Ed. 314; Farrington *v.* Tennessee, 95 U. S. 679, 24 L. Ed. 558; Asylum *v.* New Orleans, 105 U. S. 362, 26 L. Ed. 1128.

In People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, the court, at page 51, 111 N. Y., page 704, 18 N. E., and page 265, 2 L. R. A., said: "An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly would be equally ineffectual and void." That this contract is protected by the constitution from destruction or impairment by legislation intended to accomplish that result, either directly or indirectly, is established by the authorities to which reference has been made.

Whether the plaintiff's contract is impaired by the legislation under which the defendant has established its waterworks will now be considered.

We have already said that such legislation was not in excess of the power of the legislature, in so far as it granted to the villages of the state the right to construct and operate waterworks, notwithstanding the existence in such villages of a private corporation engaged in the same business, which obtained its franchise under the act of 1873. But the appellant contends that chapter 181 of the Laws of 1875, and the acts amendatory thereof and supplemental thereto, under which the defendant has proceeded to construct waterworks of its own, authorize the village, as its competitor, to tax the plaintiff company in the event that the net water receipts are not sufficient to pay interest and principal as they become due. Thus it may be compelled to contribute towards the cost of the construction and maintenance of the waterworks of its competitor, and, in addition, a system of water taxes is devised by which taxpayers who are customers of the plain-

Same—Same—Same.

tiff corporation may be discriminated against, and thus compelled, through self-interest, to cease taking water from the plaintiff, and take that of the defendant instead. Section 16 of the act provides: "In case the entire annual receipts for water rents, after deducting as in the preceding section provided, shall, in any year, not be sufficient to pay the interest for that year on said loans, or in case in any year when any of the principal of the loan secured by said bonds falls due, the amount of said receipts for water rents, after making said deduction, together with the sum in the said sinking fund, shall not be sufficient to pay said principal, * * *" shall "cause such deficiency to be assessed, levied and collected from the taxable property of said village. * * *" By chapter 507 of the laws of 1889, authority was conferred upon the boards of water commissioners, acting under chapter 181 of the Laws of 1875, to establish a scale of water rates for the use of water, also rates to be assessed upon all real property abutting on the streets where the water pipes are laid. This section was amended by chapter 662 of the laws of 1893, so as to authorize boards of water commissioners to "establish a scale of rates for the use of water and also rates for fire protection to be assessed on all real property abutting on the mains or within two hundred feet of the hydrants, the owners or occupants of which do not use the water for domestic or manufacturing purposes." By chapter 284 of the Laws of 1894, it was further amended so as to read as follows: "Boards of water commissioners * * * may establish a scale of rates for the use of water and also rates for fire protection, to be assessed on all real property abutting on the mains or within two hundred feet of the hydrants, or on such real property so abutting, or within such distance, as such boards may deem beneficial, upon which real property the water is not used by the owners or occupants thereof for domestic or manufacturing purposes." It is difficult to conceive of a more ingenious and effective device to deprive the plaintiff of its customers than the provision of the statute which we have just quoted. The development of the law

upon that subject is interesting, but we shall not stop to discuss it, as the provisions we have quoted seem to make their own comment.

The provision of the act of 1894 had become incorporated into the act of 1875 before this defendant organized and proceeded in the construction of its waterworks under the latter act. By it we perceive the water commissioners are authorized to "establish a scale of rates for the use of water, and also rates for fire protection, to be assessed upon all real property abutting on the mains or within two hundred feet of the hydrants" ; or the commissioners may ignore such limitations altogether, and create others, which may, if they so determine, coincide with the corporate limits ; and, further, they may confine the assessment to real property upon which the water is not used by the owners or occupants thereof for domestic or manufacturing purposes ; for the statute provides, as an alternative or a substitute for an assessment on all real property abutting on the mains or within 200 feet of the hydrants, that an assessment may be made "on such real property so abutting or within such distance as such boards may deem beneficial, upon which real property the water is not used by the owners or occupants thereof for domestic or manufacturing purposes." Who can doubt that a board of water commissioners that would refuse to take such a plant as the plaintiff's by proceedings *in invitum*, and thereby necessarily at its fair valuation, would not hesitate to make use of the discretion so broadly conferred, in order to secure all of the patrons of the private company, or that they would find it at all difficult to determine that it would be "beneficial" to assess a large part of the cost of fire protection upon the inhabitants who had opposed their plan as destructive of property and wasteful, and had continued to take water from the private corporation as a matter of principle ? And, again, who can doubt that the villagers would expect to be discriminated against should they refuse the request of canvassers to become customers of the board of water commissioners? An attempt to exercise the authority

sought to be conferred by this provision of the statute would necessarily deprive a private corporation of all its customers, and, as a result, the business of such corporation would be absolutely destroyed,—a business which the law assured it at the time of its incorporation should not be interfered with otherwise than by competition.

If the provisions of the statute authorizing the taxation of the plaintiff for the payment of the obligations incurred in the construction of the defendant's waterworks and the provision authorizing a discriminating tax against its patrons are so connected with the purpose of the act and the object in view that it cannot be said that they do not constitute an essential part of the scheme of the act, then it should be held to be in contravention of section 10 of article 1 of the federal constitution and void. It is, however, a well-settled principle of construction that where the void provisions are separable from those that are lawful, and those that remain are capable of being executed, the valid provisions will not be condemned because of the unconstitutionality of other provisions not absolutely essential to the main purpose of the act. Bridge Co. *v.* Smith, 148 N. Y. 540, 554, 42 N. E. 1088, and cases cited. It is obvious that the offending provisions do not constitute an essential feature of the act of 1875, as amended. Indeed, the discriminating feature of the act of 1894 did not become incorporated into the original act until nearly 19 years after its passage, and the elimination of that feature of the statute will in no wise interfere with the just and proper working out of the general purposes of the act, which is to enable municipalities to provide for an independent system of waterworks, to be owned and controlled by the municipal authorities. Neither is it an essential part of the scheme that the plaintiff's property should be taxed to pay for the construction and maintenance of the defendant's waterworks. Abundant resources are provided for the working out of the plan for paying for the property and the cost of its operation, with-

Same—Same—Statutes—Effect of Void Provisions

out assessing the property of the plaintiff for such purposes, and we are of the opinion that, in view of the public interests involved (for many municipalities have constructed independent waterworks under this statute), the rule should be invoked which authorizes the elimination of the provisions of a statute which, if allowed to remain, would condemn it, where it can be done without interference with the general plan and scope of the act. The judgment should be affirmed, with costs.

BARTLETT, J. (dissenting). In this action the plaintiff sues in its own right, and not as a taxpayer of the village. The legal questions involved are of great general importance, and affect a very large amount of invested capital. The argument, as set forth in the able briefs of counsel on both sides, has taken a wide range, but, in my opinion, there is one controlling question that is decisive of this case. In order to state this question intelligently, a reference to the legal situation is important. In 1873 the legislature enacted the general law for the formation of water companies. Laws 1873, c. 737. That act has been amended from time to time, particularly Laws 1885, c. 422. The policy of this legislation has a most impotant bearing on the question under consideration. While the statute of 1873 is in form a general law authorizing the formation of water companies, it contains a limitation that permits the organization of a corporation thereunder only when the local authorities of the village interested have given their consent. In 1875 (chapter 181) the legislature passed a law authorizing the villages of the state to furnish the municipalities and their inhabitants with pure and wholesome water. This statute provides, in detail, how a village may organize and conduct a corporation and water system of its own. It further provides (section 22) that, if it shall become or be deemed necessary by the board of water commissioners, they may institute condemnation proceedings to acquire the rights, privileges, grants, and properties of an existing corporation. This is optional with the village authorities only, and the existing company has

no power to compel the water commissioners to purchase or condemn its rights and property. In 1887 the trustees of the village of Skaneateles, as authorized by the act of 1873 as amended, granted to the plaintiff company the consent or franchise to perfect its organization and supply the village and its inhabitants with water. In 1889 the works were completed, and the plaintiff entered upon the performance of its corporate duties. In 1896 proceedings were instituted which resulted in the village of Skaneateles availing itself of the provisions of the act of 1875 (chapter 181), and it is now conducting a corporation and water system of its own. The municipal company failed to avail itself of the right to acquire the property of the old company under condemnation proceedings. In this case, as in many others, the old company has ceased to pay expenses, and it is only a question of time when its bonds and stock will be worthless. Before considering the legal position of the village under the state of of facts disclosed by this record, it may be well to inquire as to the legitimate risks assumed by the incorporators of the plaintiff at the outset.

I am of the opinion that the plaintiff did not acquire an exclusive right, under the act of 1873, to supply water to the village of Skaneateles and its inhabitants. *In re* City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270. I think the plaintiff took the risk of the village authorities, at any future time, granting permission to private parties to form another water company, and allowing it to furnish water to the municipality for public use as well as to the inhabitants. If there is no exclusive right in the plaintiff, and if the village is free to permit the formation of as many corporations by private parties as they deem proper, we have a situation where the freest competition is permitted, and no monopoly exists. All who embark in business ventures are bound to consider in advance that their investment of capital is subject to the peril of close, and oftentimes successful, competition. The vice of monopoly is that it escapes competition, to the detriment of the consumer.

We come, then, to the controlling question in this case: Is it competent for the legislature to authorize a village to organize a water company of its own, to furnish water for private and public use, when its trustees have previously granted a consent or franchise for a private corporation to do the same thing, without requiring the village, either by purchase or condemnation proceedings, to acquire the rights and property of the old company? I am of opinion that the legislature has no such power, and the act of 1875 is, in that respect, unconstitutional, as depriving the plaintiff of property without just compensation or due process of law, and denying to it the equal protection of the laws. It seems very clear that a municipal corporation, standing in the position of the village of Skaneateles in this record, cannot engage in the business of furnishing water to itself and its inhabitants, and drive the corporation that was organized by its consent to do the same business into bankruptcy. If this was accomplished by fair and legal competition, that would be the end of the matter, as no valid objection could be made. The foundation of the argument to the contrary is that the municipality does not stand on an equal footing with the old company, and invite it to fair and open competition. In the first place, it controls its own patronage as to furnishing water for public use, which is a considerable source of revenue to the existing company. The latter, if competing with a new private company in this regard, would have an equal opportunity of obtaining the contract from the village, as it would go to the lowest bidder, but not so where the latter organizes a company. Again, the village has the power to impose a tax upon the property or the existing company as a taxpayer to raise a fund to build the plant of the municipal corporation, and to make good from time to time any deficit in the conduct of its business. Furthermore, the village has the power to establish a scale of rates for the use of water, and also rates for fire protection, to be assessed on all real property abutting on the mains, or within two hundred feet of the hydrants, the owners and occupants of

which do not use the water for domestic or manufacturing purposes. Laws 1889, c. 507, as amended by Laws 1893, c. 662. Any patrons the old company retains will be driven at once into the municipal company by this tax. This assessment of rates for fire protection was properly designed to compel the nonconsumer to contribute for benefits and protection enjoyed, but it will incidentally require the patrons of the old company to associate themselves with its municipal competitor.

In view of the facts as stated, it is obvious that the municipal water company is in no legal sense the ordinary competitor of the old company, but is armed with powers that will inevitably drive the latter from the field, and its bondholders and stockholders be subjected to a total loss of all capital invested. This is not competition; it is annihilation.

As before stated, this litigation affects a very large amount of invested capital, aside from the case at bar, and the question is whether a court of equity is powerless to prevent the utter destruction of this property, or can it invoke legal principles which will do justice between the parties. It seems to me that there is but one course to be pursued. The property of the old company should be purchased by private contract, or condemned under the statute, before the municipal water company is permitted to begin work on its plant. When the town of New Lots was annexed to the city of Brooklyn, the latter was prohibited from supplying water to the territory included in the town until the expiration of the charter of the water company, or until the city should purchase or acquire its property. Laws 1886, c. 335, § 4. The course suggested is the only one that can even approximate justice in the situation now presented. The old company, with a large bonded indebtedness that has been increased by reason of losses incurred during the early years of the venture, is sure to suffer financially, even after a fair and honest condemnation proceeding. In the case before us the old company first undertook the task of supplying a country village with water, and encountered the usual expe-

rience of the few taking it and the many refusing it. The general popular appreciation of the fact that a water company offers for a comparatively small sum of money an abundant supply of pure and wholesome water for domestic and sanitary purposes is a matter of slow growth in a small country village, and the capitalists who embark in the enterprise suffer losses at the outset. It is simple and obvious justice that the municipal corporation, before availing itself of the work and losses of the pioneer company, should acquire its property by purchase or condemnation proceedings. To hold that one of the powers the legislature has placed in the hands of the village, by which the plaintiff has been partially destroyed, is unconstitutional, avails nothing when others, equally potent, are allowed to stand, to the utter destruction of the old company. There is nothing in precedent, as I read the cases, to prevent a court of equity from granting relief in that large class of cases of which the plaintiff is one. I vote for reversal.

All concur with PARKER, C. J., for affirmance, except BARTLETT, J., who reads dissenting opinion, and HAIGHT, J., not voting.

Judgment affirmed.

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CHESAPEAKE & P. TEL. CO. *et al.*

*v.*

MAYOR, ETC., OF CITY OF BALTIMORE *et al.*

(*Court of Appeals of Maryland, June 22, 1899.*)

**Right to Appeal from Decree—Refusing an Injunction.**—A bill to enjoin a city from interfering with the construction of telephone conduits, with exhibits sustaining its allegations, was filed, and immediately laid before a judge of the circuit court, who on the same day, "upon consideration of the foregoing bill of complaint," passed a decree refusing the injunction. *Held*, that under the laws of Maryland complainant was entitled to appeal from such decree.

**Chesapeake & P. Tel. Co. *v.* Mayor, etc., of Baltimore**

**Ordinance Authorizing Construction of Telephone Conduits—Contracts.***—The overhead lines of certain telephone companies were rightfully in the streets of a city, when the city passed an ordinance authorizing them to construct underground conduits for their wires. The ordinance provided, among other things, that such grant should not be exclusive; and that, "in consideration of the rights and privileges granted to them by this ordinance," the companies should pay annually a certain sum for each lineal yard of the conduits so constructed, and provide, free of cost or rent, space in the conduits for a cable for the exclusive use of the public, etc. The provisions of the ordinance were such that no public interest embraced within the public power could be served by repealing it. *Held*, that the result of the ordinance and its acceptance by the companies was the creation of a valid contract, and an ordinance providing for its repeal was void.

**Same—Same—Same.**—Such contract could not be annulled by the city in order to obtain from the companies a larger annual payment more fairly proportioned to the value of the privilege granted by the ordinance.

**Same—Same—Effect of Legislative Ratification.**—Franchises and privileges granted by municipal corporations, and confirmed by the legislature, cannot be annulled by the municipalities.

**Same—Same—Enjoining City.**—The city having threatened to prevent the construction of conduits under such contract, injunction was the proper remedy of the companies.

APPEAL by plaintiffs from Baltimore city circuit court. *Remanded.*

Argued before MCSHERRY, C. J., and PEARCE, FOWLER, SCHMUCKER, and BRISCOE, JJ.

*A. W. Machin* and *Bernard Carter*, for appellants.

*John V. L. Findlay*, for appellees.

PEARCE, J. The appellants (being the plaintiffs below) filed a bill in the circuit court of Baltimore city for the purpose of enjoining the city authorities from preventing, obstructing, or in any way interfering with the construction by the plaintiffs, under the supervision of the city commissioner, of underground conduits

Case Stated.

*See Michigan Tel. Co. *v.* City of St. Joseph (Mich.), *ante*, p. 261, and *note*, p. 270.

upon certain streets named in the bill, according to the plans of location and construction filed with the bill, or with the making of the necessary excavations for such conduits, or with the use thereof for the laying and using of telephone wires therein. The material facts of the case may be condensed as follows: The Chesapeake & Potomac Telephone Company is a corporation of the state of New York, authorized to construct and operate telegraph lines partly in and partly out of the state of New York, including all the cities, towns, and villages of Maryland, and has ever since its incorporation, in 1883, exercised its franchises both in the state of New York and in Baltimore city. The Chesapeake & Potomac Telephone Company of Baltimore City was incorporated under the laws of Maryland in March, 1884; its stock being owned by the Chesapeake & Potomac Telephone Company. It is authorized to construct telegraph lines upon any roads, highways, or streets within the state, by erecting the necessary poles and fixtures, and to acquire the property of any telegraph companies then or thereafter existing; and it did thus acquire various telegraph lines. By the decisions of this court, telephone lines are included within the term "telegraph lines"; and by chapter 161, Laws 1886, now section 254, art. 23, of the Code of Public General Laws, all corporations formed as the Chesapeake & Potomac Telephone Company of Baltimore City was formed, and then in practical operation in Baltimore city, were authorized to lay any part of their lines underground on any route where they were authorized to construct such lines aboveground; but all corporations not in practical operation at the adoption of the Code of 1888 were obliged to obtain a special grant for this purpose from the state, and the assent and approval of the mayor and city council, before using either the surface or the subsurface of the streets. Prior to 1889 there were no underground conduits in Baltimore city for the use of telegraph or telephone lines, but during that year the plaintiffs established a telephone exchange in a new building upon

the corner of St. Paul street and Bank Land, a thickly-settled business location in the central portion of the city; and on May 9, 1889, the mayor and city council enacted Ordinance No. 41, entitled "An ordinance to provide for laying the wires of the Chesapeake and Potomac Telephone Company of Baltimore City, or of the Chesapeake and Potomac Telephone Company, or of both of said companies, in underground conduits in the city of Baltimore." The preamble of this ordinance sets forth that, if the overhead system of wires is wholly continued, the number of such wires along the street leading to the exchange must be largely increased, that such increase and concentration at so central a point are not desirable, and that the public convenience requires that such wires, so far as practicable, should be laid in cables underground. It then proceeds to enact and ordain that the said two telephone companies, acting separately or in conjunction, be authorized "to lay their wires to be used in connection with said exchange" in suitable conduits, "under the surface of the streets, alleys, or highways, in said city now traversed, or to be so traversed by their respective wires:" provided said conduits be so constructed as not to injure any vault, sewer, water, or gas pipe: and provided, further, that "the grant" above mentioned, should not be deemed an exclusive grant, and that the same should cease and determine unless three miles of such conduits should be constructed within two years from May 9, 1889, and that after said two years, and as rapidly as said wires should be laid in said conduits, all poles of said companies along all streets upon which their conduits were so laid should be removed, and should not be replaced, except when necessary to make connections with the buildings to be served by such conduits and wires. It further ordained that said telephone companies, "in consideration of the rights and privileges granted to them by this ordinance," before constructing any portion of said conduits should comply with the following requirements: (1) To execute an agreement, in form and with security to be

approved by the mayor and city council, to pay to the city, annually, 30 cents for each lineal yard of the first four miles of conduits so constructed, and 20 cents per lineal yard for all over four miles: provided, no annual payment should be less than $3,000; also before constructing any portion of such conduits, to file with the city commissioner a plan showing the location and character of all conduits next proposed to be constructed, which construction should always be under the supervision of the city commissioner, and to replace all paving removed in said construction, to the satisfaction of said commissioner. (2) To provide, in every conduit so constructed, space, free of cost or rent, for the laying therein by the fire commissioners of the city of a cable for the exclusive and official use of the police and fire alarm telegraph, and the police and patrol wires. (3) Before exercising any privileges under said ordinance, to execute a bond in the sum of $10,000, with approved security, conditioned for the faithful performance of all requirements of said ordinance on the part of the said companies.

The bill avers that the plaintiffs accepted the provisions of this ordinance, and that much more than three miles of conduits were constructed within two years from its approval. It sets forth in detail compliance by the plaintiff with each and every requirement of the ordinance, and charges that said ordinance, so enacted and so accepted, constitutes a contract reasonable in its terms, which the city was competent to make, and which is binding on both parties thereto. In 1892 the legislature of Maryland, by chapter 200 of the Acts of that session, authorized the mayor and city council of Baltimore to provide a series of conduits under the streets, lanes, and alleys of said city, either by constructing the same, or by authorizing their construction by any person or corporation, but expressly provided therein "that nothing herein contained shall be deemed or taken to modify or change in any manner the provisions of ordinance number forty-one (41), or the rights and privileges granted thereby." In 1898 the legislature, by chapter 123 of the Acts of that session, en-

acted the new charter of Baltimore city, being a repeal and re-enactment, with amendments, of article 4 of the Code of Public Local Laws. In section 6 of article 4, as thus amended, under the subhead "Streets, Bridges, and Highways," the general powers of the mayor and city council in relation thereto are enumerated and prescribed. Among these is the power to regulate the use of streets, highways, and roads, and to prevent encroachment thereon or obstruction of the same, and to regulate the opening of street surface for the purposes authorized by law or ordinance: to regulate the use of streets, lanes, or alleys by telegraph, telephone, or other wires, in, under, over, or upon the same, and to require all such wires to be placed underground after such reasonable notice as it may prescribe; and to provide for a series of conduits,—using in this last connection the exact language of the act of 1892, and then adding, also in the exact language of that act, except that the word "article" is substituted for the word "act," that "nothing herein contained shall be deemed or taken to modify or change in any manner the provisions of Ordinance number forty-one (41)." The bill then avers that, in reliance upon the rights and privileges secured by Ordinance No. 41, the plaintiffs constructed during 1889 and 1890, in the streets of Baltimore, more than 11 miles of underground conduits, in all of which space was provided, free of cost or rent, for the laying of a wire for the exclusive use of the city, and in most of which such wire was laid, and has been used by the city from the construction of the conduits down to the present time; that in the year 1898 the plaintiffs found it necessary for the accommodation of their increasing business to construct additional underground conduits in the northern and western part of the city, in accordance with plans submitted to the city commissioner, and they obtained a permit therefor on August 8, 1898, in pursuance of which, and under the supervision of the city commissioner, they proceeded with the construction of said conduits, and the laying of cables therein, until the middle

of November, 1898, and that said last-mentioned cables and conduits, constructed at a cost of over $29,000, are now used in connection with said exchange; and that in all of them provision is made for a wire for the exclusive use of the city of Baltimore. The bill further avers that, while under Ordinance No. 41 no permit is required for the construction of said conduits, yet by Ordinance No. 2 of 1892 it is provided that no person or corporation shall, for any cause whatever, dig up or uncover any of the streets, lanes, or alleys of the city without a written permit therefor from the city commissioner, approved by the mayor, and that the plaintiffs, being willing to comply with the regulation, and having need to construct underground conduits upon Robert, Madison, and other streets, on the 24th of April, 1899, applied in writing for a permit, filing at the same time plans of the location and character of such proposed conduits, as required by the ordinances, but that on April 28, 1899, the city commissioner refused to issue the permits applied for, or either of them, without assigning any reason for such refusal; and the plaintiffs then charge that the true reason therefor was the passage by the mayor and city council on April 18, 1899, of an ordinance (a copy of which was filed with the bill) purporting to repeal Ordinance No. 41, and providing that such repeal shall not interfere with the use and control of conduits constructed under Ordinance No. 41 before January 1, 1898: provided, such conduits do not interfere with the future use of the streets upon which the same are constructed. The bill further charges that, the permit applied for having been wrongfully refused, the plaintiffs are entitled to proceed without such permit, and are desirous to do so, but they aver that they have good reason to believe, and that they do believe, that the mayor intends to use his official authority, and his influence with the police, directed by the marshal thereof, to prevent by force the construction of such conduits, and they therefore pray for an injunction against the mayor and city council of Baltimore, William T. Malster, mayor of the city of Baltimore, and Samuel T. Hamilton, marshal of

the police of said city, enjoining them and their agents from interfering in any manner with the construction of said conduits upon the streets named in the prayer of the bill. The bill, with exhibits sustaining its allegations, was filed May 1, 1899, and was immediately laid before the court (JUDGE WICKES), who on the same day, "upon consideration of the foregoing bill of complaint," passed a decree refusing the injunction, from which decree this appeal is brought.

The defendant has moved to dismiss the appeal upon the ground that it appears upon the face of the record that its object is to obtain from this court a preliminary ruling on an *ex parte* statement of a question involving public interests of great magnitude, without notice to defendant or those to whom is confided the duty of protecting those interests. But this motion cannot prevail. Section 29 of article 5 of the Code of Public General Laws provides that, whenever any court having equity jurisdiction shall refuse to grant an injunction according to the prayer of the bill, an appeal may be taken from such refusal. This section had its origin in the act of 1832, c. 197, which authorized an application to the judges of the court of appeals, or one of them, when an injunction should have been refused by the county court. Under that act only the bill and the exhibits were submitted to the judge of the court of appeals, and the original papers were forthwith transmitted by the clerk. In Steigerwald *v.* Winans, 17 Md. 62, the court held that a complainant has the right to demand a decision on his bill, and, if the injunction be refused, to appeal directly to this court, but if he elects to postpone his appeal till proof is taken, and the cause decided on it, his right of appeal under this section is gone. In Bell *v.* Purvis, 15 Md. 22, it had been previously decided that where an answer comes in before injunction ordered, and so denies the equity of the bill as to authorize dissolution of the injunction on motion to dissolve, the injunction ought not to be granted; and the same was also held in Barnum *v.* Gordon, 28 Md. 97. In that case the

Right to Appeal from Decree Refusing an Injunction.

court said that the judge to whom an application for an injunction is made may with perfect propriety take time for consideration, and give notice to the parties to be affected by the injunction, and afford them an opportunity to be heard, in any case in which he may believe the purposes of justice may be thereby subserved. But it is obvious that this is a matter necessarily within the discretion of the court, and this discretion must in the present case, as in all others, be deemed to be exercised with as much wisdom and propriety in forbearing to give as in giving such notice. The case last mentioned was decided in 1867, and evidently in consequence of these decisions chapter 102 of 1868 was enacted, which added to section 29 of article 5 the provision that the right of appeal thus given shall not be prejudiced by the filing of an answer, nor by the taking of depositions with reference to the allegations of the bill, and that the appeal should be heard on a transcript of the bill or petition, with such other papers in the cause as may be necessary, so soon as conveniently may be after such transcript shall have been filed in the court of appeals. The act of 1868 therefore changed the rule previously declared. In O'Brien *v.* Railroad Co , 74 Md. 363, 22 Atl. 141, the answer was filed before injunction ordered, and, being in, was entitled to be considered, but could not, *per se*, defeat the right of appeal. In Bonaparte *v.* Railroad Co. (Md.), 23 Atl. 784, Mr. Bonaparte sought an injunction to restrain defendant from constructing its railroad across an avenue by which he had access to his premises ; alleging that defendant's charter was void, and work thereunder was being prosecuted without lawful authority. When the bill was filed, and a preliminary injunction was asked for, instead of granting the injunction at once and outright, the judge set a day for hearing, and, until that hearing could be had, passed a restraining order. The defendant contended that this restraining order was a preliminary injunction, and that the order passed after hearing was the dissolution of the injunction already granted, and it therefore moved to dismiss the appeal; but the court said it was

evident the judge below desired to know whether a case was made for preliminary injunction, and therefore ordered a hearing on the application made by the bill, and the motion to dismiss was accordingly overruled. The inference from this is too plain for controversy,—that the judge might, had he seen fit, have granted the injunction without hearing, and that in such case there would have been a right of appeal. We therefore think the plaintiffs, in the course pursued, were in the exercise of their legal right to present the question raised by the appeal, and the motion to dismiss will therefore be overruled.

Ordinance Authorizing Construction of Telephone Conduits—Contracts.

It is contended on the part of the defendant that ordinance No. 41 has none of the elements of a contract, but that it is simply a license, revocable whenever the public interests require its revocation,—saving, of course, any rights which the plaintiffs have acquired up to the time of revocation, as attempted by the repealing ordinance,—while on the part of the plaintiffs it is contended that the passage of Ordinance No. 41 was a proposition to the plaintiffs to enter into a contract securing to them valuable rights and privileges, upon valuable considerations moving from them, and that upon acceptance by plaintiffs of the provisions of said ordinance, and compliance by them with all its stipulations, a valid contract was made and concluded, and that, after the construction thereunder of three miles of conduits within two years, the contract, by its terms, became irrevocable, and the repealing ordinance is for this reason inoperative and void. The defendant relies largely, in support of its contention, upon the decision in the Lake Roland Elevated Ry. Co. Case, 77 Md. 352, 26 Atl. 510. In that case an elaborate and learned opinion was delivered by JUDGE BRYAN, holding that the ordinance of the mayor and city council of Baltimore authorizing the railroad to lay down double tracks on certain streets in the city was not irrevocable, and that a subsequent ordinance repealing that part of the previous ordinance which authorized double tracks on Lexington street, but permitting a single

track upon certain conditions, was a valid exercise of power by the mayor and city council; but we have not been able to discover any expression of opinion or any intimation therein, or in the opinion delivered by JUDGE ALVEY in overruling a motion for reargument, that the grant was regarded merely as a license, as was argued by defendant's counsel in his brief in this case. The proof was that, if double tracks were permitted on Lexington street, their existence would be incompatible with the use of that part of the street by vehicles of any description, and that the sidewalks alone would be available for use by the general public. JUDGE BRYAN said it was the duty of the city authorities to preserve the streets for their primary legitimate purposes, and that it was not competent for them, by such a grant, to defeat these purposes. The whole opinion went upon the ground that such contracts are made upon the implied condition, understood and accepted by the grantee, that if the safety, health, or morals of the public shall require the rescission or modification of such contract, it may be rescinded or modified, under the police power of the state or of the city, where the city has been vested by the state with such power. In illustration of the application of this rule of law, we may cite the case of Railroad Co. *v.* Town of Bristol, 151 U. S. 556, 14 Sup. Ct. 437, in which the removal of a grade crossing constructed under the charter was ordered, and an overhead crossing was required at the cost of the railroad. The action of the legislature was sustained, the court saying that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts are not violated by the legitimate exercise of legislative power in securing the public safety, health or morals. And in the later case of Chicago, B. & Q. R. Co. *v.* Nebraska, 170 U. S. 57, 18 Sup. Ct. 513, where the state undertook to alter the terms of a contract under which a viaduct had been built at the joint expense of the city and the railroad, it was said that, where the subject-matter of the contract is one which affects the safety and welfare of the public, it is held

to be within the supervising power of the legislature, when exercised to protect the public safety, health, or morals, and that clause of the federal constitution which protects contracts from legislative action cannot in every case be successfully invoked. "The presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the power of the legislature." It was upon the same principle that this court proceeded in Rittenhouse *v.* Mayor, etc., 25 Md. 336, in sustaining the repeal of an ordinance providing for the erection of an almshouse, and in annulling a contract with Rittenhouse for its erection, but providing for an equitable settlement for work done under the contract. The site of the building having been found to be unhealthy, due regard for the safety of the inmates and for the public welfare required that the site should be abandoned, and work upon the building discontinued. We cannot agree with the counsel for defendant that JUDGE ALVEY, in his opinion on the motion for reargument in the Lake Roland Case, treated the grant of the privilege of the streets to the railroad as a license. We think he dealt with it as a contract liable to rescission or alteration only by reason of the duty of the city to keep the streets safe for their ordinary uses, and that his reference to compensation "in accordance with a well-established principle in the case of the revocation of an executed license" was but a legal analogy altogether appropriate for the illustration of his argument.

We think the result of Ordinance No. 41, and of its acceptance by the plaintiffs, was the creation of a valid contract and that there is no evidence or suggestion in the record of any danger to the public health, safety, or convenience which would warrant its rescission by the mayor and city council in whole or in part. On the contrary, the recitals of that ordinance show that both the public safety and the public convenience were controlling considerations with the mayor and city council in its enactment, and in the

body of the ordinance the public interests were sedulously guarded by the following provisions: (1) That the right to lay underground conduits should not be deemed an exclusive grant, so as to create a monopoly; (2) that the rights granted should be forfeited unless a permanent underground system was assured by the construction of at least three miles of conduits within two years thereafter; (3) that all poles or lines where conduits were laid should forthwith be removed, except when required for house connection; (4) that an annual charge of from 30 to 20 cents for every lineal yard of conduit laid should be paid to the city; (5) that, in each conduit laid, space should be provided, free of costs or rent, for a wire for the exclusive use of the city authorities; and (6) that an adequate bond should be given for the faithful performance of all these requirements. Chapter 200 of the Acts of 1892 and the new charter (chapter 123) of 1898 both afford evidence that there has been no change in the views entertained by the public, as represented by the charter commission and the legislatures of 1892 and 1898, as compared with the views of the mayor and city council by whom Ordinance No. 41 was enacted, since both acts of the legislature give authority to the city to provide a series of conduits throughout the streets and alleys, by constructing or authorizing the construction of the same by any person or corporation, and to require all telegraph and telephone wires to be placed in such conduits. No public interest embraced within the police power could be served by repealing Ordinance No. 41, and thus compelling the plaintiffs either to resort again, so far as relates to all these conduits laid since January 1, 1898, and to all future extension of their wires, either to the inferior pole service, which may at any time be prohibited by the city, or to put all such wires in the conduits to be constructed or authorized by the city, and upon new and other terms than those prescribed in Ordinance No. 41. The city might, it is true, thus secure a much larger annual payment from the plaintiffs,—one, perhaps, more fairly proportioned to the value of the franchise granted by the

Same—Same—Same.

ordinance. But this wish or motive will not justify the repeal proposed. In Citizens' Water Co. *v.* Bridgeport Hydraulic Co., 55 Conn. 1, 10 Atl. 170, the consideration was pressed upon the court that a decision in behalf of defendant would be the protection of a monopoly, and that a monopoly is odious. In rendering its decision for defendant, the court said: "This argument forgets the fact that it is the judicial duty to preserve contracts inviolate, rather than to destroy monopolies. Communities may endure monopolies, but cannot endure the violation of contracts."

But, apart from the fact that the attempted repeal of Ordinance No. 41 cannot be brought within the exercise of the police power, so as to justify the repeal upon that ground, there is another and a conclusive reason why it is beyond the power of the mayor and city council in any mode to effect its repeal or impair its operation. By chapter 200 of the Acts of 1892 the legislature of Maryland, after three years' trial of the policy inaugurated by the mayor and city council upon their own authority, in the contract with the plaintiffs, authorized the mayor and city council either to construct, or to authorize any person or corporation to construct, conduits throughout the city for the use of telegraph, telephone, and electric light wires, to require all such wires to be placed in said conduits, and to prescribe reasonable rentals for the use thereof; thus establishing a general and uniform policy under the sanction of the state, similiar to the special policy inaugurated under the sanction of the mayor and city council with the plaintiffs. But to this general grant of authority there was annexed a proviso "that nothing contained in this act shall be deemed or taken to modify or change in any manner the provisions of Ordinance No. 41 approved May 8th, 1889, or the rights and privileges thereby granted." Whether the mayor and city council had the power to grant these rights and privileges at the time that contract was made, it is not necessary to inquire, because chapter 200 of the Acts of 1892 must be taken as a legislative ratification and confirmation of that

Same—Same—Effect of Legislative Ratification.

contract, with all its rights and privileges. Cooley, in his work on Constitutional Limitations (6th Ed., 486) speaking of contracts by municipal corporations, which, when made, were in excess of their authority, but subsequently have been confirmed by legislative action, says, "If the contract is one which the legislature might originally have authorized, the right of the legislature to confirm it must be recognized." In Railroad Co. *v.* Reany, 42 Md. 117, the act of 1870, c. 80, while containing no express terms of ratification of the ordinance under which a tunnel had been built by the railroad, used in one section "terms equivalent to terms of express ratification," and JUDGE ALVEY said: "The authority given by the city to make the tunnel is recognized, and there is power given to charge additional profits and tolls for its own use. This is a clear ratification or grant of authority, at least by implication, and it is settled that such authority may be granted by implication. Inhabitants of Springfield *v.* Connecticut R. R. Co., 4 Cush. 63." See, also, O'Brian *v.* Commissioners, 51 Md. 24, to same effect. In Pompton *v.* Cooper Union, 101 U. S. 202, the question was whether certain bonds of the town of Pompton were issued with proper legal authority. Subsequent to their issue the legislature abolished the commissioners of Pompton township, and devolved upon a township committee certain duties of the commissioners, including the providing of necessary funds and the payment of interest on these bonds. It was held that this act was a recognition of Pompton as one of certain towns authorized to issue such bonds, and the court said, "In cases like this, legislative ratification is the equivalent of original authority, and what is clearly implied in a statute is as effectual as what is expressed." Upon the principle last above stated, the act of 1892 not only operates as a ratification of Ordinance No. 41 as of the date of its approval, and of all that had then been done thereunder, but it also operates, from its own date of approval, as a legislative grant for the future of the rights and privileges thus ratified, and as a legislative prohibition against any interference by the city

therewith. The body of that act authorized the city to require all companies using any kind of electric wires to place them in the conduits constructed or authorized by the city; but the proviso excepted out of this grant of power the plaintiffs' companies, and in express language declared that their rights and privileges should not be modified or changed in any manner, and the exception was thus not only a grant of power thereafter to enjoy, under the protection of the state, the rights and privileges they had theretofore enjoyed under the protection of the city, but it was also the equivalent of an express denial of power to the city to compel them at any future time to surrender these privileges, in virtue of the general powers conferred upon the city to deal with electric companies in this regard. The new charter, approved March 24, 1898, contained the same proviso as the act of 1892, and all we have said as to the legal effect of that act is applicable to the new charter, without repetition. Inasmuch as the new charter repealed the whole of article 4 of the Public Local Laws of the state relating to the city of Baltimore, and embracing the act of 1892, it was necessary to incorporate into the charter the proviso of that act, in order to give to the plaintiffs the continued assurance that their rights and privileges were beyond the control of the mayor and city council, and to remove all doubt upon that subject from the minds of all persons interested in, or dealing with, said companies. We hold, therefore, that from the moment the plaintiffs were, by the proviso of the act of 1892, taken under the protecting ægis of a legislative grant, the mayor and city council were powerless to destroy, change, or modify their existing rights and privileges, and the ordinance of April 18, 1899, is wholly ineffectual. The possible unfavorable effect of such a decision upon other corporations using electric wires, or upon the revenues of the city, however much deprecated by others, are considerations which we are not at liberty to entertain; and we may here repeat the language of this court in the Lake Roland Elevated Ry. Co.'s Case, 77 Md. 382, 26 Atl. 516: "We say once

more for all that we are dealing only with the case before us. Franchises and privileges granted by the legislature cannot be annulled by an ordinance of the mayor and city council." Whether it is competent for the state to repeal that part of the new charter which confirms the rights and privileges conferred upon the plaintiffs by Ordinance No. 41 is a question which does not arise in this appeal. The state has not attempted such repeal, and until it does so it would be premature and unauthorized to pass upon its right and power to do so.

The remaining question is as to the jurisdiction of the court to interfere by injunction in this case. The rule is thus stated in 2 Beach, Inj. § 1279: "Equity will interfere to protect and secure the enjoyment of a franchise secured by statute, because it affords the only plain and adequate remedy. So it will protect rights of a like character acquired under a lawful municipal ordinance." This rule is supported by numerous cases both in the state and federal courts, among which are City of Quincy *v.* Bull, 106 Ill. 337; Springfield Ry. Co. *v.* City of Springfield, 85 Mo. 676; Easton R. Co. *v.* City of Easton, 133 Pa. St. 505, 19 Atl. 486; Osborn *v.* Bank, 9 Wheat. 842; and Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, where the court said: "It has been repeatedly decided, in affirmance of the general proposition, that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity." In Holland *v.* Mayor, etc., 11 Md 197, it was held that a municipal corporation will be restrained by injunction when attempting to enforce an invalid ordinance; and that case was confirmed in Page *v.* Mayor, etc., 34 Md. 567. In Hooper *v.* Railway Co., 85 Md. 509, 37 Atl. 359, it was held that the company was entitled, under its legislative grant, to use electricity upon any of its lines, and that this right could not be destroyed by the refusal of the mayor to issue a permit for the erection of the poles; and the

Same—Same—Enjoining City.

injunction which had been granted by the court below restraining the city authorities from interfering with the erection of the poles, was sustained by this court. That case is not distinguishable in any material point from the case before us, and in view of that decision the majority of the court is of opinion that the proper remedy is by injunction. The writer of this opinion regards *mandamus* as the proper remedy, and a memorandum will be filed, briefly stating the ground of this view. We think, however, that, in a matter of so much moment to the parties, the purposes of justice will be advanced by permitting further proceedings in the cause, and that an opportunity should be given the defendants to answer, and for a hearing upon the merits; and the cause will therefore be remanded, under article 5, § 36, of the Code, without affirming or reversing the decree of the circuit court for Baltimore city. Cause remanded, without affirming or reversing the decree, for further proceedings in conformity with this opinion; costs above and below to abide the final result of the cause.

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## NORTHWESTERN TEL. EXCH. CO.

*v.*

## CITY OF MINNEAPOLIS.

(*Supreme Court of Minnesota, Aug. 6, 1900.*)

**Telegraphs and Telephones—Power to Compel the Placing of Wires under Ground.**—The city council or governing body of a municipality has the undoubted right in the exercise of the police power to order the placing of telegraph and telephone wires under ground whenever, in the exercise of a fair discretion, it decides that public interests require it to be done; but it cannot act arbitrarily in the premises.

**Same—Municipal Grant—Impairment of Obligations of Contracts.***—An ordinance of a municipal corporation granting a tele-

*See Michigan Tel. Co. *v.* City of St. Joseph (Mich.), *ante*, p. 261, and *note*, p. 270.

phone company the right to use its streets for the erection of poles and overhead lines, under conditions as to permits and directions where the same shall be placed, when accepted and acted upon by the company, is a contract which the municipality cannot unreasonably or arbitrarily repeal or amend so as to impair rights acquired under it.

Same—Same—Same.—When such an ordinance has invited investments and expenditures made in good faith and in reliance upon it, the city authorities cannot arbitrarily impose by subsequent regulations, without necessity, or the demands of public convenience, additional burdens upon the company which are clearly beyond the reasonable exercise of the police power.

Construction of Ordinance.—In this case an ordinance of the city of Minneapolis construed, and *held*, upon the facts set forth in the complaint and admitted by the demurrer, to constitute a contract with the plaintiff authorizing its use of streets, subject only to the reasonable and necessary restrictions of its exercise of the police power.

(Syllabus by the Court.)

APPEAL by plaintiff from Hennepin county district court. *Reversed.*

*D. F. Morgan*, *Arthur H. Noyes*, and *Geo. D. Emery*, for appellant.

*Frank Healy*, for respondent.

LOVELY, J. This action was brought to restrain the city of Minneapolis, its mayor, chief of police, and city engineer, from the threatened enforcement of certain ordinances, as illegal interferences with the rights of the plaintiff in the use of its telephone system and excharges in that city. A demurrer was interposed by the defendants denying the sufficiency of the complaint to state a cause of action. The court below sustained the demurrer, from which order plaintiff appeals.

Case Stated.

The complaint sets forth at length the grievances of which plaintiff complains, and facts which justify its fears that the defendants will, by the enforcement of two recent ordinances, practically destroy the value of its property, and asks for an injunction to restrain the threatened invasion of its vested rights. It is not necessary to set forth the complaint in full, but we shall call attention briefly to the facts pleaded, which

have led us to the conclusion that the demurrer should have been overruled. The telephone exchange system of plaintiff has a central station in Minneapolis, with substations, switch boards, appliances, and many thousand miles of wire in subsurface conduits, as well as upon 110 miles of lines stretched on poles throughout the city, connected, through the central station, with each other and with similar exchanges in other cities in the state of Minnesota, as well as the adjacent states of North and South Dakota, Iowa, and Wisconsin. Its general system includes numerous toll lines extending into those states, and comprising more than 3,500 miles of pole lines and 27,000 miles of wire, with public stations to the number of 600 or more, all of which exchanges and toll stations are connected with the central office at Minneapolis and with each other, affording intercommunication with more than 12,000 individual subscribers, and is of great beneficial use to the public generally. This system was completed and has been extended from time to time since 1883, in reliance upon an ordinance of the city wherein the municipality authorized the use and occupation of its streets for such purpose, and prescribed the conditions governing the same. Section 1 of this ordinance provides that plaintiff "is hereby authorized to erect, establish, and maintain within the limits of the city of Minneapolis telephone poles, and to stretch and maintain thereon the necessary wires for a telephone exchange system, according to the conditions hereinafter stated." Section 2 provides that the plaintiff "shall file in the office of the said city engineer a statement of the streets and alleys of the said city which it has already occupied under permission of the city." Section 3 provides that the plaintiff "shall file with the city engineer written application for all streets or alleys it may hereafter wish to occupy with its poles and wires," and, further, that "if such application shall be approved by the city engineer and the chief engineer of the fire department, such approval shall be deemed a permission of the city to so occupy said streets and alleys for the purpose above stated." Section 5 provides

that "in case of a change of grade of any street or pavement so occupied by said company it shall reset its poles so as to conform to the grade of such street or pavement so changed, and in such manner as the city engineer shall direct; and said poles and wires shall be removed whenever, in the opinion of the city council, the public interest shall so require." After the plaintiff had accepted this ordinance, and had established a large part of its system, the city, by an ordinance approved December 10, 1886, required the company to remove its poles throughout a certain district defined therein, embracing business portions thereof, and including a total area of 88 100 of a square mile, and to place its wires throughout this district in cables laid in conduits beneath the surface of the streets, which requirement the plaintiff complied with at an additional cost of $300,000. In May, 1899, a further ordinance was adopted, amending the last ordinance, whereby the original underground conduit district was enlarged to 10 times its former area by the addition of 186 miles of streets not previously included therein, in which the plaintiff then maintained 70 miles of its pole line system, carrying over 3,000 miles of wire, costing $125,000, and supplying its service to more than 2,000 subscribers residing in that territory. The complaint sets forth specifically that in the district included in the last ordinance the lines of plaintiff are so located and constructed as not to interfere with or obstruct the safety or convenience of ordinary travel upon such streets in any way, and that the whole of plaintiff's system as now extended and located therein is safe and convenient for the public use; also that the new district includes a large area of the city, very much of which is sparsely populated and settled, wherein many of the streets are not opened or graded, and that the expense of complying with such ordinance is so great that the plaintiff cannot conform thereto, but must abandon the maintenance of its system, and will, by the enforcement of the ordinance, be prohibited from the occupation of the streets within such district, except in accordance with the plan or mode prescribed, which is not required or demanded

by public safety or convenience, and which is so expensive that it cannot be adopted, to the loss of that portion of its system and the value of the business it now conducts therein, and to the injury of the entire system and the public by largely curtailing its extent and service. The complaint also alleges that in October, 1899, the city again amended the underground ordinance of 1886, wherein, with reference to this subject, it in terms provided "that until the 1st of December, 1903, the city council of the city of Minneapolis may permit the erection of poles, brackets, wires and fixtures within the new territory, subject to the right of the city council to cause the removal of such poles, brackets, wires and fixtures at any time it may order and direct the same to be removed," which is claimed to be an unreasonable and arbitrary discrimination in the granting and refusing of privileges before granted and provided for, without regard to the places or persons affected, or the public requirement, or the circumstances upon which the same may be desirable. It is alleged further that repairs, extensions, and renewals of lines throughout the telephone districts of the city are necessary, and must be made from time to time, to keep them safe and efficient for public service. It appears also that after the adoption of the last ordinance the plaintiff has requested from the proper authorities permission to make repairs and extensions of its lines, which privileges have been refused under the alleged authority of the last two ordinances, and plaintiff's servants, in attempting to make the same, have been arrested, and forbidden under penalty of arrest from making necessary repairs, in maintaining such lines.

It is asserted by plaintiff that the action of the city in the respects referred to and in its requirements thus brought under review constitute an unlawful impairment and interference with its vested contract rights, and amounts to a destruction and confiscation of its property by a prohibition of the use and enjoyment of its franchises, for which damages are sought to be recovered, and it is asked that by injunctional order the defendant be restrained from further enforcement of

the subsequent restrictions, or any interference with its legal contract rights and privileges secured under the ordinance of 1883. In view of the disposition which we deem it our duty to make of this appeal we shall only consider the effect of the original ordinance under which the plaintiff was authorized to establish and maintain its system, in connection with the ordinances of May and October, 1899, under which the rights of the plaintiff, as set forth in the complaint, are and will be violated by the city unless restrained by injunction. It is claimed on the part of the defendant that under the charter of the city in the exercise of its governmental powers it had the right to enact and enforce the two ordinances referred to without reference to their reasonableness or effect upon the contract rights plaintiff posesses by reason of its prior acceptance of the ordinance under which its system was established. On the argument to support this theory, counsel for defendant put the issue as a contest between the authority of the common council to rule the city on the one hand, and of the telephone company to violate the restraints of municipal control on the other. Without discussion of principles that are fundamental, it is enough to say that such an issue is not raised by this demurrer. The questions presented doubtless involve the authority of the common council, but we need not cite authorities to support the self-evident elementary principles essential to any government that such authority must not be arbitrarily exercised. It is not a question of "rule or ruin" between the city and the telephone company. Neither may rule the other. Both are subject to "the law of the land"; and if the ordinance of 1883, which was accepted by the plaintiff, and large expenditures of money made in reliance thereon, is a contract between the city and the plaintiff, the latter cannot wrongfully, and in disregard of justice, without right or reason be deprived of its vested rights obtained thereby, without a plain and palpable violation both of the state and federal constitutions. That the effect of the first ordinance, and the acceptance and expend-

itures of large sums of money by plaintiff in reliance thereon, established such contractual rights between the parties, we have no right to question, either upon principle or authority. An ordinance of a municipality, surrendering a part of its powers to a corporation to secure and encourage works of improvement, which require the outlay of money and labor, to subserve the public interests of its citizens, when accepted and acted upon, becomes a contract between the city and the corporation who relied upon it, and the grantee cannot be arbitrarily deprived of the rights thus secured. They are protected by the organic law which forbids the impairment of contracts or interference with vested rights without due process of law. Railroad Co. *v.* Smith, 29 Ohio St. 292; Chicago *v.* Sheldon, 9 Wall. 50, 19 L. Ed. 594; Waterworks Co. *v.* Rivers, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; City Ry. Co. *v.* Citizens' St. R. Co. 166 U. S. 567, 17 Sup. Ct. 653, 41 L. Ed. 1114; Railway Co. *v.* Carthage, 36 Ohio St. 634; City of New Orleans *v.* Great Southern Telephone & Telegraph Co., 40 La. Ann. 41, 3 South. 533; City of Burlington *v.* Burlington St. Ry. Co., 40 Iowa 144; Com. *v.* City of Boston, 97 Mass. 555; City of Ashland *v.* Wheeler, 88 Wis. 607, 60 N. W. 818; City of St. Paul *v.* Chicago, M. & St. P. Ry. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458. These are but a few of the many authorities which clearly enunciate the rule above stated, the reason for which is founded upon the most obvious principles of justice, as well as sound policy and public necessity; for no one would invest his money to further any plan of improvement for his own as well as the general benefit if the right to the advantages which he as its promoter expects to derive from its success might be destroyed by the uncertain or capricious inclinations of the governing body of the municipality.

Same—Municipal Grant—Impairment of Obligations of Contracts.

If the city could not arbitrarily violate the contract embraced in the ordinance of 1883, after its acceptance by the

company, it must likewise be acknowledged that the plaintiff was subject to such reasonable regulations as might be, by the city authorities, adopted for the good government of the municipality to secure the necessary advantages of urban control by its citizens, and their reasonable rights as such, of which it is the conservator. Unquestionably there is a continuing right by the city to regulate its local affairs. This right is what is universally known as the police power. It exists intact without reservation in the constitution, and it cannot be surrendered, so that the franchises of private corporations must be conclusively presumed to be acquired with reference to its existence, and contract rights must yield to the proper burdens imposed by growth and development. Elliott, Roads & S. 58, 60. But this extensive power of regulation is not to be exercised at mere whim or caprice. It should be appropriate to and commensurate with the public necessity for the protection and promotion of public morals, health, safety, necessity, or convenience (City of Burlington *v.* Burlington St. Ry. Co., 49 Iowa 144–147); and the application of the police power cannot be extended by the authority which is intrusted with such application to an arbitrary misuse of private rights. Any such unwarranted exercise of authority is unconstitutional and void. State *v.* Addington, 12 Mo. App. 214; City of Saginaw *v.* Swift Electric Light Co., 113 Mich. 660, 72 N. W. 6. Recently the subject of municipal control over the erection and maintenance of poles and electric wires in the streets of cities has received particular attention from the courts, and it has been held that an electric company, which has been granted, by the local authorities, the right to use the streets, and has constructed its line in compliance with and in reliance upon the terms and conditions of such grant, cannot be made the subject of new conditions, aside from what may necessarily be required of it by the city in proper execise of the police power and the control and regulation of the streets. Com. *v.* Warwick, 185 Pa. St. 623, 40 Atl. 93; Louisville Trust Co. *v.* City of Cin-

Same—Same—Same.

cinnati, 47 U. S. App. 36, 22 C. C. A. 334, 76 Fed. 296; Lewis *v.* Newton (C. C.), 75 Fed. 884; City of New Orleans *v.* Great Southern Telephone & Telegraph Co., *supra*; Rutland Electric Light Co. *v.* Marble City Electric Light Co. (Vt.), 26 Atl. 63; Hudson Tel. Co. *v.* City of Jersey City, 49 N. J. Law 303, 8 Atl. 123. We need not go further in disposing of the demurrer than to apply the doctrine established by these authorities, for it is easily applied to the facts which are conceded by the demurrer. The addition of ten times the area through which underground conduits must be constructed at an enormous additional expense, without necessity, is violative of the contract entered into between the city and the plaintiff in the ordinance under which the system was established. The requirements imposed by the later ordinance upon the company to build such conduits through ungraded streets in suburban parts of the city and in the open country, is clearly, upon its face, unreasonable, and the claim to exercise such right on the part of the common council of the city at their "will and mere motion" cannot be sustained in the reasonable exercise of the police power, or upon any theory that is consistent with the acquired and vested rights which the plaintiff enjoys under the constitution and the laws. The authority thus demanded by the city touches the limits of absolutism, and, if the right of plaintiff to use its franchise depends upon it, it amounts to an unnecessary destruction of property rights, which no municipality can or ought to exercise, and does not receive the sanction of this court.

We cannot agree with the court below that the provisions of section 5 of the ordinance of 1883, which provides for the removal of poles by direction of the municipality, contains a reservation of authority in the city to enforce the removal of the same at its pleasure. Conceding that the provisions of section 5 extend to the whole ordinance,—which we do not decide,—and thereby authorized the city to order the removal

Construction of Ordinance.

of the poles from streets not being graded, such power cannot be unreasonably and arbitrarily exercised. This provision manifestly implies the exercise of judgment upon such necessities as are always liable to arise in improving the streets, to be enforced only for the public good in the administration of municipal functions, under the authority of the police power. In a proper case, where the city exercises its power of control in the regulation of the use of the streets by the plaintiff, based upon necessity and the interest of the public, that power will be sustained. Beyond that limit it cannot go. The reservation, in the ordinance of October, 1899, to the city, of the right to grant or refuse the occupation of the streets at its own will, is nothing better than a declaration of a right to arbitrarily grant or refuse the privileges to which it refers. The two ordinances of May and October, 1899, which upon their face and in terms seek to amend the first underground ordinance of 1886, are to be read and construed together as one enactment; for, when such an amendment is adopted, there are not two separate enactments, the old and the new, but by their union there is produced one law, *viz.* the ordinance as amended. Black Interp. Laws, pp. 356, 357. When these ordinances are read together, as they evidently should be, under the facts admitted by the demurrer they are, as a whole, void, for they are clearly open to the objection which is best stated in a leading authority in the highest court of the land upon a similar question: "They seem to confer, and do actually confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. * * * The power given * * * is not confined to discretion in the legal sense of that term, but is granted at mere will. It is purely arbitrary, and acknowledges neither guidance or restraint." Yick Wo *v.* Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Maybury *v.* Light Co., 38 Mich. 154; City of New Orleans

*v.* Great Southern Telephone & Telegraph Co., *supra*; State *v.* Finch (Minn.), 80 N. W. 856.

We do not intend, in the disposition of this case, to abridge the wholesome right of the municipal government to regulate their internal and domestic affairs within the limits essential to the welfare of their citizens. A city has the right to enact reasonable ordinances, and to enforce them; but it is the conservator, not the autocrat, of the police power. It may originate its useful authority, and apply it by specific and valid regulations; but that exercise is not despotic, nor absolute, but is open to review, and an ordinance that upon its face is unreasonable and arbitrary is subject to judicial examination. When it is not bounded by a fair and wise administration of municipal authority, but is unreasonable and arbitrary, it will be declared void, and the municipality restrained from its enforcement. Evison *v.* Railway Co., 45 Minn. 375, 48 N. W. 6, 11 L. R. A. 434. To prevent any misunderstanding, we add that the complaint tenders the issue that the city council arbitrarily and without any reasonable necessity enacted the ordinance complained of. The demurrer admits the allegations of the complainant in this respect, and our conclusion is based upon this admission. If, however, the plaintiff on the trial fails to establish such allegation by competent evidence, it must comply with the ordinance, for it is not to be doubted that the city council has the plenary power to extend the subsurface district wherever, in the exercise of a fair discretion, it decides that public interests require it to be done; but it cannot do so arbitrarily in the premises as alleged in the complaint.

Telegraphs and Telephones—Power to Compel the Placing of Wires under Ground.

We have not thought it necessary to consider the claim of counsel for defendant that the charter of the city of Minneapolis authorized or warranted the adoption of the ordinance of 1899, if, in the view which we have taken, which is expressed above, such charter provisions would be in violation of the constitution; but our examination of the subject does

not lead us to the conclusion that there is any inconsistency between the charter of the city and the rights of the plaintiff as justifies such claim. The order of the trial court sustaining the demurrer is reversed, and the case is remanded for further proceedings according to law.

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## CHAFEE

*v.*

## CITY OF AIKEN *et al.*

(*Supreme Court of South Carolina, April 23, 1900.*)

**Streets — Dedication—Acceptance—Question for Jury.***—Dedication of a street must be accepted by a municipal corporation within a reasonable time, but what is a reasonable time for such purpose is a question for the jury.

**Same—Construction of Incorporating Act—Question for Jury.**—In an action to restrain a city from opening a street across plaintiff's lot, where it did not appear from the act incorporating the defendant city whether the legislature referred to such streets as were then open and in use, or to such as were designated on a certain plat, the question was properly submitted to the jury.

**Same—Dedication—Acceptance.**—Where a city shows acceptance of the dedication of a street by the use of a part thereof, the burden of proof is on the opposite party to show that such acceptance did not extend to the entire street.

**Same—Same—Same.**—Acceptance of the dedication of a street need not be formal.

**Same—Same—Same—Question for Jury.**—In such action, whether the city had lost its right to open the street by passing resolutions refusing to accept a certain plat with the street upon it was a question for the jury.

**Same—Same—Abandonment.**—The mere nonuser for twenty years of land dedicated for a street does not amount to such an abandonment as will destroy a city's right to open the street.

**Same—Same—Opening Street—Estoppel.**—A city is not estopped from claiming the right to open a street through land dedicated for

*See City of Ashland *v.* Chicago & N. W. Ry. Co. (Wis.), *ante*, p. 288, and *note*, p. 296.

Chafee *v.* City of Aiken

**such purpose by the fact that it remained quiet for twenty years while the land was being improved by others, unless its conduct was such as to make it inequitable to set up its claim; and whether defendant's conduct was such was a question for the jury.**

**Statutes—Construction—Province of Court.**—Where a statute is in evidence, it is proper to construe it in a charge to the jury.

**Streets—Nonuser—Estoppel.**—A city is not estopped by nonuser from claiming the right to open a street through land dedicated for such purpose, as against an occupant of the land, unless it has recognized the occupation, and the occupant has been mislead to his prejudice by the conduct of the city.

**Same—Receipt of Taxes—Estoppel.***—A city is not estopped from claiming the right to open a street through land dedicated for such purpose by the fact that an occupant of the land has paid taxes upon the same into the city treasury, unless the city had notice of such fact.

APPEAL by plaintiff from Aiken county common pleas circuit court. *Affirmed.*

*G. W. Croft & Son*, for appellants.

*Mr. Henderson*, for respondents.

GARY, A. J. This is an action for the purpose of restraining the city of Aiken from entering upon a lot which the plaintiff alleges belongs to her, and opening a street across the same; also, for damages on account of the destruction of a number of shade trees. The defendants deny the title of the plaintiff, and contend that the *locus in quo* is a part of Fauburg street, which the city of Aiken claims both by statutory and common-law dedication. The jury rendered a verdict in favor of the defendants. The plaintiff appealed upon exceptions, the first of which is as follows: "(1) Because his honor, the presiding judge, charged the jury: 'The public authorities—county commissioners, town council, as the case may be—will be held to have refused, if within a reasonable time after the dedication by the owner nothing has been done by the authorities. How much time is a reasonable time is for

Case Stated.

*See City of Ashland *v.* Chicago & N. W. Ry. Co., (Wis.), *ante*, p. 288, and *foot-note*.

the jury to determine in a given case. The jury is to consider all of the circumstances surrounding the case,—evidence of the size of the town, population, the direction in which the town may be extending, and other circumstances which may or may not account for the interval of time elapsing between a dedication and acceptance.' In this it is submitted that his honor erred; for he should have charged the jury that under the law twenty years was a reasonable time, and if the town had not accepted the dedication, or done some act showing that it intended to accept the street, within that period, then it could not legally do so afterwards, where intervening rights have accrued." The first, second, and third of the plaintiff's requests, which his honor charged, and the authorities relied upon both by the appellant and respondents, recognize the correctness of the proposition that the acceptance of the property dedicated must take place within a reasonable time. The law charged was sound in principle. If the presiding judge had charged that 20 years was a reasonable time, he would have deprived the jury of the right to determine a question which was peculiarly within their province. In reaching a conclusion as to whether the time was reasonable, the jury had the right to take into consideration, not only the time that had elapsed, but all the other facts and circumstances in the case.

Streets—Dedication—Acceptance—Question for Jury.

The second exception is as follows: "(2) Because his honor, the presiding judge, charged the jury: 'It is for you to say what evidence there was of the particular streets and alleys that were in contemplation by the then general assembly, and I must charge you that the streets and alleys did not go beyond a mile from that railroad bridge. You are to say from the testimony, if any testimony there be, what streets and alleys were at that time in contemplation of the legislature that granted this act of incorporation. It is important to bear this in mind: Does the evidence in this case show any specific plan or plat or map of

Same—Construction of Incorporating Act—Question for Jury.

the intended town of Aiken was considered by the legislature, and does the evidence in this case show what streets and alleys were referred to by the legislature in the act of the assembly I have quoted, between the limits of one mile from the railroad bridge?' In this it is submitted that his honor erred, because there was no evidence touching this matter, and he therefore should not have submitted this proposition to the jury; and his honor further erred in leaving it to the jury to construe whether the act of the general assembly referred to any plan or map of the town of Aiken, but, to the contrary, he should have instructed the jury that said act did not refer to any plan or map." The cases of State *v.* Lythgoe, 6 Rich. Law 112, and Town Council *v.* Lythgoe, 7 Rich. Law 435, dispose of several questions that have arisen in this case. In those cases the court had before it the map of Pascalis & Dexter, while in this case it had before it the plat of Thomas Anderson, representing a part of the town of Aiken as laid out by the South Carolina Canal & Railroad Company, dated 31st of May, 1834. This disposes of so much of the exception as alleges that there was no evidence upon which the question could be submitted to the jury. The other question raised by the exception is disposed of by what was said in Town Council *v.* Lythgoe, *supra*. In speaking of the acts of 1835 and 1836, the court says: "Did they refer only to such [streets] as were then open and in use, or to such as were designated on a certain plat or plan of a town called the 'Town of Aiken', constructed as early as September, 1834, at the instance of the South Carolina Canal & Railroad Company. * * *" Now, the langauge of the legislature is not of clear and precise import. The subject-matter, as it regards the question here, is uncertain. There is a latent ambiguity. Evidence and reasoning on both sides have been resorted to in this case, as in that of State *v.* Lythgoe, for the purpose of expounding it. We cannot and need not repeat here all that has been and may be said on either hand. If the meaning of the words used by the legislature be legitimately a

question of doubt and of fact,—if evidence be legitimately receivable upon it,—it should have gone to the jury; and this much was adjudged in the former case, in relation to a contest involving the very same point, resting upon the same basis, though the complaint of the plaintiffs, made through the state, related to a different street. But the instruction to the jury was that no power had ever been given to the plaintiffs to open new streets in the town of Aiken, except by a strict compliance with the act of 1825 regulating the action of commissioners of roads; that the power of the corporation was confined to the keeping open and in repair of such streets, only, as were in existence at the date of the charter; and that in that charter, or the amendment of 1836, there was not the slightest reference to the map of Pascalis & Dexter. Presuming always that the jury are guided by material instructions from the court, when they find accordingly it is manifest that they excluded from their deliberations any inquiry whether the acts of assembly adopted streets indicated upon the plan of Pascalis & Dexter. If this be right, it seems that this court ought to have remanded for a new trial the case of State *v.* Lythgoe, wherein the said inquiry was submitted to the jury upon evidence then heard, and their finding that the street then in question was established as a public road in the town of Aiken was affirmed in this court. There was the same necessity for submitting the question to the jury in this case that there was in the case just mentioned, and there was no error in so doing.

The third exception is as follows: "(3) The plaintiff's eighth request is as follows: 'If an owner of land lays off a street on a plat within the corporate limits of the town, intending thereby to dedicate such street as a public way, then the town has the right to accept or use the whole or a part of such street, as it deems proper; and if the town has accepted or used a part of said street, and has allowed the rest of said street to remain unopened, then it would not necessarily follow that, because it has used one part, it had accepted the whole of the street

Same—Dedication—Acceptance.

through its entire length. Under such circumstances, it is plain that if said street is a public way through its entire length, those who make such claim would be called upon to show by the evidence that the town did in fact accept the whole of said street as a public way through the unopened part.' It is submitted that said request is a correct proposition of law, and his honor, the circuit judge, erred in refusing to charge same." The circuit judge said: "I cannot charge you that, because a street is a street in its entirety. To charge this law would make it possible to take up a long street in spots. Where a street is dedicated, it is a matter of fact for the jury to say whether the town authorities have done any act to show acceptance of it as a street. I cannot hold that. That request is not allowed." If the judge had charged as requested, the jury might naturally have supposed that they could not infer an acceptance of the entire street from the use of a part thereof,—that acceptance of the unopened part would have to be established by evidence additional to that which showed acceptance of the part that was used; and this would have been misleading. When the municipality shows acceptance by the use of a part, the burden of proof is on the opposite party to show that it did not extend to the entire street. In the case of Town Council *v.* Lythgoe, it seems that the only act showing acceptance of the entire street was the digging of a well by the town authorities in the street beyond the *locus in quo*. The presiding judge did not err in refusing to charge the request.

The fourth exception is as follows: "(4) The plaintiff's ninth request is as follows: 'That if the jury find from the evidence that B. M. Rogers had what is called "Fauburg Street" laid off on a plat, and intended thereby to dedicate the same to the town as a street, but the town has never formally accepted the same, and that the town authorities remained quiet for a great number of years, and, without objection, allowed O. J. Chafee and others to make improvements upon the lot that is now claimed as a street, it would be inequitable for the

Same—Same—Same.

town now to make such claim, then it would, in law, be estopped from so doing.' It is submitted that this request contains a correct proposition of law, and his honor, the circuit judge, erred in refusing to charge the same." The circuit judge said: "That is not, in my opinion, good law,—to require formal acceptance. The acceptance may be virtual. This requires formal acceptance. Therefore I refuse that." There was no testimony tending to show formal acceptance, and for the judge to have charged as requested would have eliminated from the consideration of the jury other well-recognized modes of acceptance, such as using, repairing, or working the streets, as well as many others mentioned in the text-books. It is not error to refuse to charge a request unless all the propositions of law therein contained are sound.

The fifth exception is as follows: "(5) The plaintiff's tenth request is as follows: 'If the jury believe that Beverly M. Rogers intended to give a street known as "Fauburg Street," as represented on the Anderson and Mahon plats of the city of Aiken, but that the city council of Aiken passed resolutions refusing to accept the Mahon plat with Fauburg street upon it, then it has lost its right to open said street.' It is submitted that this is a correct proposition of law, and his honor, the circuit judge, erred in refusing to charge the same." The resolution is as follows: "Be it resolved, as the survey made by Mr. Mahon of the town of Aiken is to be investigated as to its correctness, and, as shown by his survey, if found correct, that it will come hard on the citizens generally to move their houses, as they have already formed a line with their fences and houses, be it resolved that we will not adopt the survey, but let the present line as now formed be the guide for all persons now building or putting up fences hereafter." The presiding judge, in refusing to charge the request, said it would be an effort on the part of the court to interpret evidence. After reading the resolution, he continued as follows: "The purport of that resolution seems to be not to disturb the lines then existent, and I could not hold that the effect

Same—Same—Same—Question for Jury.

was to deprive the town council of any right in Fauburg street, if they had any." If the judge had charged as requested, he would have virtually taken from the consideration of the jury the question whether the city had lost its right to open said street, and this would have been an invasion of their province. There was therefore no error in refusing this request.

The sixth exception is as follows: "(6) The defendants' fifth request is as follows: 'That, by the act of incorporation of the town of Aiken passed by the general assembly in the year 1835, it was made the duty of the intendant and warden to keep all roads, streets, and alleys within said limits that is, within the limits of the town) open and in good repair, and for that purpose they are invested with all the powers granted by the law to the commissioners of roads. And that if the jury find that the legislature intended thereby to set apart and devote to public and corporate uses such places as they may find were marked out upon any plan of the town of Aiken, and that said plan or town included said Fauburg street as a street, then the jury is charged that the legislature had the power to invest such places with the character of streets or highways. And the jury is further charged that it was immaterial whether, at the time of the passage of said act of the legislature, the street had been entirely open and fit for all uses. It is enough if they find that the legislature distinctly designated it as a street. And, if they so find, then, in the investigation of this case, they must consider Fauburg street as an established, dedicated street in said town, by legislative authority.' It is submitted that his honor erred in leaving it to the jury to construe the act of the general assembly to find whether said legislature had in contemplation any map or plan when the town of Aiken was incorporated, for it was the duty of his honor to construe said act. And his honor further erred in submitting to the jury the question whether the general assembly had in contemplation any map or plan when the town of Aiken was incorporated, when there was no evidence

upon this point whatever." This exception is disposed of by what was said in considering the second exception.

The seventh exception is as follows: "(7) His honor erred in charging the third request of the defendants, as follows: 'The jury are charged that if they find that the space in question was set apart as a street, called "Fauburg Street," by the act of the legislature of 1835, or that the same was dedicated by B. M. Rogers, and accepted by the corporate authorities of the town of Aiken, then, as a matter of law, they are charged that the ancestors or predecessors of the plaintiff in this action could not acquire title to said space or street by adverse possession, no matter how long they may have occupied the same, for the reason that adverse possession could not be set up against the town of Aiken, the same being a municipality. And the jury is further charged that the mere nonuser of such space or street by the town authorities for a period of twenty years will not amount to such an abandonment as would destroy the rights of the public to open said street.' For it is submitted that it was improper to leave to the jury whether the act of the legislature of 1835 did set apart Fauburg street; that he should have construed said act himself. And his honor further erred in charging that the mere nonuser of such space or street for a period of twenty years would not amount to a public abandonment, or destroy the right of the public; but he should have charged to the contrary,—that the holding of said street for a period longer than twenty years, by any one holding the same in his own right, would destroy the right of the town, after that period, to open the same." In view of the decision in the case of Crocker *v.* Collins, 37 S. C. 327, 15 S. E. 951, deciding that a municipal corporation cannot be barred of its right to a street or alley by adverse possession, the appellant's attorneys withdrew so much of said exception as relates to that point. So much of the exception as assigns error because the circuit judge left it to the jury to say whether Fauburg street was set apart by the act of the legislature of 1835 has already

Same—Same—Abandonment.

been disposed of. The only remaining question under this exception is whether the presiding judge erred in charging that the mere nonuser of the street by the town authorities for a period of 20 years would not amount to such an abandonment as would destroy the right of the public to open the street. In the case of Crocker *v.* Collins, *supra*, MR. CHIEF JUSTICE MCIVER, after stating that mere adverse possession for the statutory period of a street or alley in a town would not confer a good title, proceeds as follows: "Upon the same principles, we do not think that mere nonuser of a street or alley of a town for a period of twenty years would amount to such an abandonment as would destroy the rights of the public." This is sound in principle, and disposes of the question.

The eighth exception is as follows: "(8) Because his honor erred in charging the fourth request of the defendant, as follows: 'That on the question of estoppel, raised by Mrs. Chafee against the city council, as to holding Fauburg street as a street, the jury is charged that the burden of proving the estoppel is on her, and that as under the act of the legislature incorporating Aiken, up to the year 1889, there was no authority given to the corporate authorities to contract as to the sale or disposition of the streets of Aiken, they could not be estopped by any act of theirs; for, in order to have estopped said authorities, they must have had the power to contract concerning the matter out of which the estoppel arises. For it is submitted that said request does not state the law, and that his honor should have charged to the contrary,—that if the town or city of Aiken remained quiet, and allowed the plaintiff or her predecessors to take possession of and improve said land as their own property for more than twenty years, then the defendant would be estopped from asserting any right to claim said lot as a street, against the plaintiff and those under whom she claims." We do not see how the presiding judge could have charged in the manner the appellant contends, without invading the prov-

Same—Same—Opening Street—Estoppel.

ince of the jury. If the city was estopped, it was by reason of its conduct, and depended upon the time and manner in which it acted. It has been shown that neither adverse possession nor mere nonuser for 20 years would estop a municipality from asserting its right to open a street, and there is no reason why remaining quiet for 20 years, while the property was being improved by others, should estop it, unless its conduct was such as makes it inequitable to set up its claim; and this was a matter to be determined by the jury.

The ninth exception is as follows: "(9) Because his honor erred in charging the defendants' fifth request, as follows: 'That under the act, passed in the year 1889, incorporating the city of Aiken, the city authorities, with the consent of adjacent landowners, had the right to sell the freehold of any street, as they deemed best; and hence, after the date of said act, as they had the power to contract with the consent of adjacent landowners, if they did any acts amounting to an estoppel with the consent of adjacent landowners, said acts of estoppel being acted upon by Mrs. Chafee, or those from whom she claims, then said plea would be established; and in this connection the jury is charged that the consent of adjacent landholders, set forth in the charter of the city, means not only those who own at just the part of the street that it is claimed is occupied, but includes all landowners on the street in question, called "Fauburg Street," whose lands are near, or close, or contiguous, but not necessarily actually touching, the spot in question,—that is to say, such landowners along the street who would be impeded in the use of the street by its being closed at the point in question.' For there was no testimony whatever in the case that made the proposition of law contained in this request applicable to the case before the court, and to charge the same was confusing to the jury, and his honor should have declined to charge such request." This act was introduced in evidence without objection, and, being in evidence, its con-

Statutes—Construction—Province of Court.

struction was proper. No error is assigned in the construction of the act, but simply that it should not have been construed at all. Even if there was error, it was harmless, especially as the law was clearly laid down by the presiding judge in his general charge.

The tenth exception is as follows: "(10) Because his honor erred in charging the defendants' sixth request, as follows: 'In considering the question of estoppel, and the facts and circumstances claimed by the plaintiff as matters out of which an estoppel arises against the city of Aiken, the jury is charged that an estoppel cannot exist where the knowledge of both parties is equal, and nothing is done by the one to mislead the other. Estoppel by conduct cannot arise unless there has been some act committed upon which the party who sets up the estoppel has acted to his detriment, and changed his position. Mere nonaction on the part of the city as to the occupation of the alleged street in question cannot amount to an estoppel. The jury must find, not only that the city or its predecessor, the town of Aiken, did something to recognize the occupation of the street, but that those who claim that they occupied it were influenced so to do by the acts of the corporate authorities.' For it is submitted that the owner of land, who stands quietly by and sees another appropriate and improve the same, may be estopped from afterwards asserting a title thereto, as well as where statements were made causing such other person to act and make improvements upon the land in question. Silence, when it is the duty of one to speak, will be effective in estopping him in a proper case." As a general proposition, the law set forth in the request is sound, and, if the appellant desired the judge to charge the proposition for which she contends, a request should have been prepared to that effect. The subject of estoppel is fully and exhaustively discussed in the notes to Williamson *v.* Jones, 4 Am. & Eng. Dec. Eq. p. 222, and the request is in harmony with the principles there stated.

Streets—Non-user—Estoppel.

The eleventh exception is as follows: "(11) Because his

honor erred in charging the defendants' seventh request, as follows: 'The jury is charged, as matter of law, that the reception by the city clerk or treasurer of taxes from Chafee on the place in question cannot estop the city authorities from claiming it as a street; for, if it was a street dedicated to and accepted by the public, it was not subject to taxation, and, further, the said clerk or treasurer was a mere ministerial officer, and could not by his acts bind the city council.' For it is submitted that if a city or municipality for a long series of years receives taxes upon a lot, with the knowledge that it is claimed by the occupants as their property, then they would be estopped from asserting title thereto." The judge said: "I charge you that, for another obvious reason, the law provides a means by which taxes illegally collected can be recovered; and, if it be a fact that the taxes are illegal taxes,—if that be fact,—there is a remedy." There was error in charging this request. As a general rule, the fact that a municipality receives payment of taxes is a circumstance to be considered by the jury in determining whether the municipal authorities had abandoned their right to open a street which had been dedicated to the public. While, however, there was error, it was not such as necessitates a reversal of the judgment, for the following reasons: (1) Because the tax receipts do not show upon their face that any part of Fauburg street was included in the property upon which the taxes were paid. (2) Because there was no testimony showing that the defendant had notice that the plaintiff was paying taxes, if such be the case, upon any part of the said street. On the contrary, the treasurer of the city testifies that he did not have any knowledge of the fact; and the plaintiff's husband testifies that he did not give the notice until after the commencement of this action. The error was therefore harmless.

Same—Receipt of Taxes—Estoppel.

The twelth exception related to adverse possession, and, as it was in conflict with Crocker *v.* Collins, was withdrawn. It is the judgment of this court that the judgment of the circuit court be affirmed.

MICHIGAN TEL. CO.

*v.*

CITY OF BENTON HARBOR.

(*Supreme Court of Michigan, Oct. 17, 1899.*)

**Telegraphs and Telephones—Use of Streets—Municipal Control.**—Where a telephone company has statutory authority to construct and maintain its lines in the streets of a municipality, the latter may, under its police power, regulate the exercise of such right to prevent injury to other public interests but cannot interfere with the reasonable exercise of the right.

**Same—Same—Same—Statutes—Repeal by Implication.**—It will not be held that a general statute authorizing telephone companies to construct and maintain their lines in public streets is repealed by an act conferring upon a municipality, incorporated under it, authority to regulate or prohibit the erection of telephone or other poles in its streets, unless the language of the act is susceptible of no other interpretation.

APPEAL by complainant in chancery from Berrien county circuit court. *Reversed.*

*Wells, Angell, Boynton, & McMillan* (*N. A. Hamilton*, of counsel), for appellant.

*F. H. Ellsworth* (*G. M. Valentine*, of counsel), for appellee.

GRANT, C. J. This case in its facts differs in only one particular from that of the same complainant against the city of St. Joseph, 80 N. W. 383, the opinion in which is filed simultaneously with this. In that case the records of the common council showed a resolution adopted granting permission to the Telephone & Telegraph Construction Company, while in this case the records of the common council do not show that such permission was granted. These two cities are contiguous to each other,—separated only by a river. The work of the

Case Stated.

construction company in each was begun and carried on at the same time, and the construction company and its assignee, the complainant, have ever since been in the enjoyment of the same rights in Benton Harbor as in St. Joseph. The complainant presented a petition to the common council of Benton Harbor couched substantially in the same language, and asking for the same privileges as it presented to the common council of the city of St. Joseph. The council denied the prayer of the petition. The court denied relief in this case, while granting it in the other, because the records of the council did not show the grant of permission which it held was essential to the creation of a contract. The complainant, at the request of the council, furnished for the use of the city one telephone free of charge, and two other telephones at rates less than those charged to other subscribers for like service, which rates have been paid by the city. In the year 1893 complainant, on application of the city, granted permission to the city to carry its fire-alarm wires on the company's poles, which permission was accepted by resolution adopted by the council. The complainant gave evidence tending to show that the construction company in February, 1881, presented a petition to the common council, and that it was notified by the clerk that permission had been granted. The city clerk testified that he could find no papers of any kind in his office, presented to the council from 1881 to 1887.

Complainant contends that a contract exists between it and the city, arising out of the establishment of its system by the permission of the municipality, and the maintenance thereof for many years, and that the defendant is now estopped to deny such contract. In the view we take of the case, it is unnecessary to determine this question. Section 4 of the act (Acts 1883, p. 131) providing for telephone and messenger service companies reads as follows: "Every such corporation shall have power to construct and maintain lines of wire or other material, for use in the transmission of telephonic messages along, over, across, or under any public places, streets, and highways, and across or under any of the

waters in this state, with all necessary erections and fixtures therefor: provided, that the same shall not injuriously interfere with other public uses of the said places, streets and highways, and the navigation of said waters; to construct, provide and furnish instruments, devices, and facilities for use in the transmission of such messages, and to construct, maintain and operate telephone exchanges and stations, and generally to conduct and carry on the business of providing and supervising communication by telephone, and also the business of furnishing messenger service in cities and towns." 3 How. Ann. St. § 3718d. The statute also requires every such company to supply the public with telephones and telephonic service, to operate a telephone exchange, and to receive and transmit messages without discrimination, upon payment or tender of the usual or customary charges. *Id.* § 3718i. The complainant is engaged in interstate commerce, as its business extends into other states. The state has control over its public streets and highways, and may authorize their use for the purposes of travel and commerce without the permission of the municipalities. The state does not surrender to municipalities entire control over its streets and highways. They are under legislative control. Cooley, Const. Lim. 588. "They are for the use of the public in general, for passage and traffic, without distinction. The restrictions upon their use are only such as are calculated to secure to the general public the largest practical benefit from the enjoyment of the easement. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods." People *v.* Eaton, 100 Mich. 208, 59 N. W. 145, and authorities there cited. "No city or village has the power, by ordinance or by-law, to make general laws of the state inoperative." People *v.* Kirsch, 67 Mich. 539, 35 N. W. 157. Where a water company is authorized by its charter to lay pipes and distribute water, it has a right of access to the streets for that purpose, to be exercised in harmony with the public con-

venience. The city may regulate its exercise so as to prevent injury to other interests, but cannot interfere with the reasonable exercise of such right. City of Grand Rapids *v.* Grand Rapids Hydraulic Co., 66 Mich. 606, 33 N. W. 749; Atlantic City Waterworks Co. *v.* Consum-Water Co., 44 N. J. Eq. 427, 15 Atl. 581. Held, that an electric telegraph "is indispensable as a means of intercommunication, but especially is it so in commercial transactions. * * * Goods are sold and money paid upon telegraph orders; contracts are made by telegraphic correspondence, cargoes secured, and the movements of ships directed." Pensacola Tel. Co. *v.* W. U. Tel. Co., 96 U. S. 1. The same statement now applies to the use of the telephone. It is as indispensable to commerce as is the telegraph. Telephone companies are subject to the same rules as common carriers. Delaware & A. Tel. & Tel. Co. *v.* Delaware, 2 C. C. A. 1, 50 Fed. 677. The same rule is held in Leloup *v.* Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1380; holding that telegraphic communications are commerce, and that the state cannot impose a tax upon the occupation or business, or exact a license. The same rules apply to telephone companies. Southern Bell Tel. & Tel. Co. *v.* City of Richmond, 78 Fed. 858. Where the statute provided that "telephone companies organized under its provisions for the purpose of constructing and maintaining telephone or magnetic telegraph lines are authorized to set their poles, piers, abutments, wires, and other fixtures along and across any of the public roads, streets, and waters of this state, in such manner as not to incommode the public in the use of such roads, streets, and waters" (Rev. St. 1879, § 879), held, that the municipal authorities could regulate by ordinance the location, kind of posts, piers, and abutments, and height of wires, but that no other restrictions could be imposed than those provided by the law. State *v.* Flad, 23 Mo. App. 185. It will be observed that the act under which complainant is organized does not require the consent of the municipality to the con-

struction of its lines. The reason of this is apparent. The business carried on by these corporations is not local, but extends over and outside the state. Where the business is purely local, the legislature, in authorizing the formation of these corporations, usually provides that it must be with the consent of the municipality. Such is the requirement in the case of tramways. 1 How. Ann. St. § 3527. So of street railways. *Id.* § 3548. So of water companies. *Id.* § 3115. So of electric light companies. *Id.* § 4191.

Evidently it was not the intention of the legislature to permit municipalities to prevent telegraph and telephone companies from extending their business along the public highways and streets of the state. This rule seems practically to be conceded by the learned counsel for the defendant, for they say that the complainant's rights, if it has any, are subject to the valid exercise of the police power of the city. Complainant concedes this to be the law. The learned circuit judge who tried the case also conceded it, but said that the city "was not confined merely to the exercise of its ordinary police powers." Evidently the city desired to impose other conditions, and in furtherance of this desire its council arbitrarily refused to permit complainant to erect its poles and stretch its wires. Such refusal was not based on the inconvenience of the public or the obstruction of its streets. Under this statute the sole authority of the municipality is the proper exercise of the police power, inherent in it, to protect the public from unnecessary obstructions, inconveniences, and dangers, and to determine where and in what manner complainant may erect its poles and stretch its wires so as to accomplish this result. It has no authority to impose other conditions. That authority rests in the legislature,—the charter-making power.

Telegraphs and Telephones—Use of Streets—Municipal Control.

It is, however, insisted that Act No. 215, Pub. Acts 1895, under which the defendant was incorporated, repeals the telephone act, in so far as it may be held to authorize

Same—Same—Same—Statutes—Repeal by Implication.

the use of highways and streets for the erection of poles without the consent of the municipality. Section 14, c. 22, of that act provides, "They [the council] shall have authority to regulate or prohibit the display, use, or placing of signs, advertisements and ąanners, awning posts and telegraph, telephone or light poles in or over the streets." The title of this chapter is, "Streets and Public Grounds," and the above language is found near the middle of the section, which specifies various subjects upon which the council may legislate. Repeals by implications are not favored. To this proposition it is unnecessary to cite authorities. The intent to repeal must very clearly appear, and courts will not hold to a repeal if they can find reasonable ground to hold the contrary. Merrill *v.* President, etc., 35 Mich. 24; Conners *v.* Iron Co., 54 Mich. 168, 19 N. W. 938. This case forcibly illustrates the danger in holding general laws repealed by implication in granting charters to municipal corporations. Did the legislature intend by the above law for the organization of cities to confer upon those municipalities the power to annul the law in regard to telegraph and telephone companies, and to entirely prohibit the use of the telegraph and the telephone, which have become essential in commercial transactions? Clearly such an intention should not be attributed to the legislature unless the language of the law leads to no other conclusion. We see no difficulty in giving effect to both laws by holding that the later act confers this authority upon municipalities, subject to the general laws of the state in regard to the use of its streets and highways for telegraph and telephone purposes. These municipalities may, under this law, prohibit the erection of these poles in places and in a manner which will injure or incommode the public. This was the view taken by the supreme court of Wisconsin under a similar provision. Telephone Co. *v.* City of Oshkosh, 62 Wis. 32, 40, 21 N. W. 828. The decree of the court below will be reversed, and decree entered in this court, in accordance with this opinion,

directing the common council of the defendant to provide, by ordinance or otherwise, reasonable regulations for the erection of the poles and stretching the wires of the complainant. Complainant will recover the costs of both courts. The other justices concurred.

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## *In re* O'BRIEN.

(*Supreme Court of Michigan, March 23, 1899.*)

**Control of Streets and Sidewalks.***—A municipality having full control of its "streets" can determine of what material and in what manner its sidewalks shall be constructed, even where the fee is in the abutting owners.

**Same—Reasonableness of Ordinance.**—An ordinance of such a municipality establishing a district in which the sidewalks must be constructed of stone, is not void as an unreasonable interference with the property rights of an abutting owner.

APPLICATION for writ of *habeas corpus* denied.

*Charles B. Blair*, for petitioner.

*Henry J. Felker, City Atty.*, and *Harvey Joslin, Asst. City Atty.*, for city of Grand Rapids.

GRANT, C. J. The charter of the city of Grand Rapids confers upon the common council the control of its streets. A street includes not alone the roadbed, but sidewalks. The city's jurisdiction and control extend over the entire street dedicated to travel on foot as well as travel in vehicles. The common council have the same right to determine of what material and in what manner sidewalks shall be constructed as they have to say of what material and in what manner the roadbed shall be constructed. The common council enacted an ordinance establishing a district in which the sidewalks should be con-

Control of Streets and Sidewalks.

*See note at end of case.

structed of stone. The petitioner lived within this district. He insisted on putting down a tar instead of a stone sidewalk, was arrested for the violation of this ordinance, and petitioned this court for a writ of *habeas corpus* to secure his release. The position of the petitioner is that this ordinance is unreasonable, and therefore void; that all the law requires is that the sidewalks shall be reasonably safe and fit for public travel, and that he may, therefore, put down a sidewalk of any material he chooses; that the ordinance is unconstitutional as an unlawful interference with the use of his own property. If this contention be true, then the city has no control over its sidewalks except to see that they are reasonably safe for public travel, and the sole question to be presented in any case would be, is the sidewalk, when constructed, reasonably safe? Walks composed of some material get out of repair and in an unsafe condition more readily than others. A wooden sidewalk requires more constant examination and care than does a stone or cement one. There is no unlawful interference with the property rights of the petitioner. He has no interest in the street except that common to the general public. He may own the fee subject to the public easement, and when the street is vacated the entire title will revert to him, but until then the municipality has the exclusive control. We are not cited to any authority which holds that the common council, under a charter like that of Grand Rapids, has not the power to determine the character and material of both sidewalks and roadbeds, and direct how they shall be constructed. We think the case of Scribner *v.* City of Grand Rapids (Mich.), 77 N. W. 699, is conclusive. It was there held that, although the plaintiff had commenced to build a sidewalk of one description, the common council possessed the power to include the locality within the stone-walk district, and compel him to change from one material to another. The writ is dismissed, and the petitioner remanded to custody. The other justices concurred.

Same—Reasonableness of Ordinance.

Foy *v.* City of Winston

**Sidewalks—Validity of Ordinance Requiring Certain Material.**—In Skinker *v.* Heman, 148 Mo. 349, it was held that an ordinance requiring all sidewalks out of repair in a certain district of the city, to be replaced at the abutting property owners' cost, by stone pavements, was not unreasonable, and therefore void, although the old brick pavement could have been repaired at a cost of $7.00 and the new stone one will cost $300.00.

An ordinance that requires a certain street to be paved with asphalt is not oppressive or unreasonable, on account of the fact that the same street was eight years before paved with cedar blocks. Galb *v.* Chicago, 174 Ill. 605.

The fact that one has a plank sidewalk, does not relieve him from the requirement of an ordinance calling for a stone or brick pavement. Huff *v.* Jacksonville, 39 Fla. 1.

In Sheley *v.* Detroit, 45 Mich. 425, an ordinance requiring a cobble stone pavement to be removed and replaced by one of cedar blocks, was held to be valid, although the old pavement was not worn. The above case was cited and followed by the same court in Wilkins *v.* Detroit, 46 Mich. 120.

An ordinance requiring a cement pavement to be laid in front of a vacant 20 acre lot, where the owner had six months before by order of the city council laid a plank walk, which was in all respects safe and in good condition, is unreasonable and unjust, therefore void. Hawes *v.* Chicago, 158 Ill. 653, 30 L. R. A. 225. See also, Bowers *v.* Barrett, 85 Me. 382; Findley *v.* Pittsburg (Pa.), 11 Atl. Rep. 678; Emporia *v.* Gilchrist (Kan.), 15 Pac. Rep. 532; Wistar *v.* Philadelphia, 111 Pa. St. 604; Estes *v.* Owen, 90 Mo. 113; Keith *v.* Wilson, 145 Ind. 149; Regenstein *v.* Atlanta, 98 Ga. 167.

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FOY

*v.*

CITY OF WINSTON.

(*Supreme Court of North Carolina, April 17, 1900.*)

**Ditch across Sidewalk—Personal Injuries—Sufficiency of Precautions—Question for Jury.**—Where a ditch 18 inches deep and 15 inches wide has been dug across a sidewalk of a city street, whether placing a plank or planks across the ditch and hanging up a red lighted lamp are sufficient precautions for the safety of persons

using the sidewalk, is a question for the jury, in an action for personal injuries caused by a fall into such ditch.

Same—Same—Liability of City for Acts of Others.*—A city may be liable for such injuries, although the ditch causing them was not dug by its agent or employees, and it had no actual knowledge that it was being dug.

Same—Same—Care Required of the Blind—Instructions.—In an action for such injuries to a blind man, it was not error to refuse to instruct that a blind man is negligent in using the streets without an attendant, or unless with his staff he constantly felt his way before and on all sides of him.

APPEAL by defendant from Forsyth county superior court. *Affirmed.*

*Glenn & Manly* and *Holton & Alexander*, for appellant.

*Jones & Patterson*, for appellee.

Case Stated.

MONTGOMERY, J. The city of Winston owns its waterworks, and supplies its inhabitants with water at established rates. There is an ordinance of the town which requires all connections with the water mains to be made by licensed plumbers, and under a permit from the city engineer, who is also the superintendent of the waterworks; but such a permit was not required at the time of the injury complained of by the plaintiff to make repairs to the pipes leading from the mains to the buildings, or to change old for new pipes. In June, 1897, W. E. Beck, a plumber, was employed by J. Jacobs to replace old pipes with new, and to do the work it became necessary to dig a ditch 18 inches deep and 15 inches wide from the curb line of the street across the sidewalk. When the workmen quit for the day, they left a plank or planks across a part of the ditch, and hung up a red lantern, lighted, to warn pedestrians. Shortly afterwards the plaintiff, who was blind, and who was regularly accustomed to walk along the street, came along, and fell into the ditch, and was injured. The charge of the court was not excepted to except by "a broadside," and it will only be necessary to consider it in respect to cer-

*See *note*, 1 Mun. Corp. Cas. 475.

tain special instructions which the defendant asked the court to give, and to which the defendant was entitled, but were not given in the words prayed for. There were eleven special instructions asked for by the defendant, which may be divided into four groups: First, those that are founded on the proposition that, the contractor having placed a plank or planks across a part of the ditch, and having hung up a red lantern, lighted, to warn passengers, the defendant, as a matter of law, even if responsible for the conduct of the contractor, was not negligent; second, that the defendant could not be liable at the suit of the plaintiff, because the city did not do the work through itself or its agents; third, that, the city having no knowledge of the work, it could not be liable; and, fourth, that the plaintiff, who was a blind man, was negligent in using the streets without an attendant, or unless with his staff he constantly felt his way before and on all sides of him. His honor refused to charge the jury that the placing of a plank or planks across the ditch and hanging up the red lighted lamp relieved the defendant from the charge of negligence. He added, properly, a qualification to the effect that those precautions of the contractor should be considered by the jury, and that it was for them to say whether or not they were sufficient to enable a person of ordinary prudence in the exercise of ordinary care to have passed with reasonable safety. The court also properly refused to instruct the jury that the plaintiff could not recover because the work was not done by the city or its employees or agents; and he also properly refused to instruct them that the defendant was not liable unless the city authorities had knowledge that the ditch was being cut, and that the workmen had left it in a condition dangerous and unguarded. McGruder, the city engineer and superintendent of the waterworks, testified that the work being done by Beck was not a new connection, but was simply the changing of pipes, and that no permission by him was necessary in the case; that

Ditch across Sidewalk—Personal Injuries—Sufficiency of Precautions—Question for Jury.

Same—Same—Liability of City for Acts of Others.

the city had been permitting plumbers to do this kind of work up to that time without application, and without a permit, and that the board of aldermen of the city knew they made repairs without permit. The court instructed the jury that the fact that the plaintiff was blind did not of itself make it negligent to pass along the public sidewalk without a guide, and without making every effort to ascertain if any danger was in his way; but he also instructed them that being blind did not relieve him from exercising ordinary care in passing along the sidewalk, and that ordinary care on his part meant a higher degree of care than would be required of a person in the possession of all his senses. Neff *v.* Inhabitants of Wellesley (Mass.), 20 N. E. 111, 2 L. R. A. 500; Smith *v.* Wildes, 148 Mass. 556, 10 N. E. 446. The main questions, then, for determination on the trial below were whether the defendant was negligent, and whether the plaintiff contributed to its negligence. The jury responded to the first issue, "Yes," and to the second issue, "No." The special instructions asked by the defendant were given in substance where they ought to have been given, and declined where they ought to have been declined. As we have intimated, there might be objectionable features to parts of the charge of his honor, but they were not excepted to. Affirmed.

Same—Same—Care Required of the Blind—Instructions.

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WHITTY

*v.*

CITY OF OSHKOSH.

(*Supreme Court of Wisconsin, Feb. 27, 1900.*)

Hatchways in Sidewalks—Personal Injuries—Negligence—Liability of Municipality.*—Although an abutting owner may lawfully use the space under the sidewalk in front of his lot, and construct and

*City of Lincoln *v.* Pirner (Neb.), 3 Mun. Corp. Cas. 233, and *footnotes*.

Whitty *v.* City of Oshkosh

**maintain coal holes and hatchways in the walk, the municipality, in the absence of contributory negligence, is liable for personal injuries resulting from its knowingly permitting such an opening to be used in a negligent manner.**

**Contributory Negligence Disclosed by Complaint.**—**In an action for personal injuries, unless the facts alleged by the complaint disclose contributory negligence, so as to leave no reasonable doubt on the subject, the complaint is not fatally defective because contributory negligence is shown thereby.**

**Same.**—**In such an action, for injuries caused by a fall into an open hatchway 7 feet long by 4 feet wide in a sidewalk about 8½ feet wide, the complaint alleged that plaintiff, in approaching the hatchway, traveled at such an angle with it that the opening was not in her line of vision till she was close upon it, and that she was free from contributory negligence. *Held*, that it did not conclusively appear from such allegations that plaintiff was guilty of contributory negligence.**

APPEAL by defendant from Winnebago county circuit court. *Affirmed*.

Case Stated.

In the defendant city, near where two much-used sidewalks met at an obtuse angle, an abutting lot owner maintained in the walk a hatchway over an excavation about 9 feet deep, for convenience in conveying merchandise to and from the basement of his building. The hatchway was 7 feet long by 4 feet wide, occupying, when open, the width of the walk except 20 inches on the outer edge. When not in use the hatchway was covered by two hinge doors, and was opened by turning the doors back on the walk. With knowledge of the officers of the defendant city, for three years before the accident, it had been the custom of the occupant of the abutting lot to frequently, and as often as he desired, open the hatchway without providing any guards whatever or means of warning to prevent persons using the walk from falling through the opening. That was the condition on the occasion in question. In that situation plaintiff approached the opening in the exercise of ordinary care, stepped into it, fell to the bottom of the excavation, and thereby received painful and serious injuries. All these facts were stated in the complaint, together with allegations show-

ing performance by plaintiff of the conditions precedent to the commencement of the action. In regard to the manner of using the hatchway, and notice thereof to the city, the following language was used in the complaint: "Said hatchway and doors were constructed with no guards or barriers of any kind or description to give warning or prevent people from stepping into the opening when the said doors were open. Said hatchway existed in said sidewalk for a period of more than three years prior to the happening of said accident, during all of which time the owner and lessee of said building had been accustomed to open said hatchway frequently, leaving an open, unguarded and unprotected space in the sidewalk, and making a dangerous hole and opening into the cellar below. The said defendant city, its officers, board of public works, and aldermen, at the time of said injury, and a long time prior thereto, well knew of the insufficiency and dangerous condition and want of repair of said sidewalk, at the point where said injury occurred, and carelessly, negligently and knowingly suffered, and permitted the same to remain in such dangerous condition." The defendant demurred to the complaint for want of facts sufficient to constitute a cause of action. The demurrer was overruled and defendant appealed.

*John F. Kluwin*, for appellant.
*Hume, Oellerich & Jackson*, for respondent.

MARSHALL, J. (after stating the facts). It is argued at some length, and the argument supported by authority, that a lot owner in a city may use the space under the sidewalk in front of his lot, constructing and maintaining, for his convenience, coal holes and hatchways in such walk, covering them, when not in actual use, so they will not affect the safety of the walk for public travel, and when in use guarding them reasonably, to prevent persons, traveling on the walk in the exercise of ordinary care, from stepping or falling into them. Such is the law. It has been often so declared by this and other courts. Papworth *v.* City of Milwaukee, 64

Wis. 389, 25 N. W. 431; Smalley *v.* City of Appleton, 75 Wis. 18, 43 N. W. 826; McClure *v.* City of Sparta, 84 Wis. 269, 54 N. W. 337; Cooper *v.* City of Milwaukee, 97 Wis. 458, 72 Wis. 1130; Severin *v.* Eddy, 52 Ill. 189; City of Peoria *v.* Simpson 110 Ill. 294. That doctrine, however, does not shield a municipality from the consequences of knowingly permitting such an opening to be used in a negligent manner.

Hatchways in Sidewalks—Personal Injuries—Negligence—Liability of Municipality.

Every city and village in this state is in duty bound by statute, in constructing, or allowing to be constructed, a sidewalk for public use, to see that it is made reasonably safe therefor, and to use all reasonable precautions thereafter to maintain it in that condition. Permission by a city to use the space under a sidewalk, with an opening thereto in the walk, and the proper use thereof, does not violate any duty owing to the public by such city. If the opening be negligently used, the proper officers of the city having sufficient notice to enable them, by the exercise of reasonable diligence, to remedy the mischief, its duty to the public is thereby violated. That was distinctly held in Cooper *v.* City of Milwaukee, *supra*. The idea is that both the occupant of a lot, to which a hatchway is appurtenant, and the public corporation, are responsible for negligence in regard to the safety of the walk. Both owe a duty to the public to keep the walk in a reasonably safe condition for travel. That of the corporation, however, is not breached, as to the circumstances of an improperly used hatchway, till its officers knowingly, or with reasonable means of knowledge, are guilty of permitting such use.

The significant fact alleged here is that the city, knowingly, for a period of three years, permitted the frequent and customary use of the hatchway in an entirely unguarded condition. That makes a plain case of breach of duty, as indicated.

In McClure *v.* City of Sparta, *supra*, as reported, the necessity of notice to the city of the existence of an open hatchway,

or of the hatchway being used in a negligent manner, so as to render the walk unsafe, does not appear to have been recognized. It is certainly the law, as laid down in Cooper *v.* City of Milwaukee, *supra*, and in this case, that the mere fact that a hatchway, lawfully located in a sidewalk and properly covered, is opened and negligently left unguarded, does not render the city liable for the consequences. No such duty rests on a city that it must so police all the public walks therein as to guard the coal holes and hatchways in such walks at all times and thereby prevent the negligent use of such openings. When it is said that a hatchway may lawfully be placed in a sidewalk for the convenience of the owner of the property fronting thereon, or the occupant of such property, such hatchway being properly covered when not in use, it necessarily follows that the municipality, charged with the duty of exercising reasonable care to maintain the walk in a reasonably safe condition for public travel, cannot be held liable for a breach of duty merely because some person may negligently leave the hatchway open. The officers of a public corporation, charged with the performance of its duties, as regards the condition of its streets and walks, have a right to assume that no one will render a walk unsafe by his manner of using it, until notified to the contrary.

It is further urged that the complaint discloses contributory negligence, and for that reason is fatally defective. Contributory negligence is matter of defense. It need not ordinarily be negatived in the complaint, or by plaintiff as a part of his proof in chief on the trial. Randall *v.* Telegraph Co., 54 Wis. 147, 11 N. W. 419; Hoth *v.* Peters, 55 Wis. 405, 13 N. W. 219; Rhyner *v.* City of Menasha, 97 Wis. 523, 73 N. W. 41. The presumption of fact is that every person conducts himself with ordinary care. So it follows that in the trial of a personal injury action, if the plaintiff can make out a cause of action without disclosing contributory negligence conclusively, the question in that regard is for the jury. Prideaux *v.* City of Mineral Point, 43 Wis. 524; Dorsey *v.* Construc-

tion Co., 42 Wis. 583; Gower *v.* Railroad Co., 45 Wis. 182; Delaney *v.* Railroad Co., 33 Wis. 72; Hoyt *v.* City of Hudson, 41 Wis. 105. The rule is the same in regard to the complaint. Hoth *v.* Peters, *supra*. That is, unless the facts alleged disclose contributory negligence, so as to leave no reasonable doubt on the question, the presumption of the exercise of ordinary care, for the purposes of the complaint, will prevail. That necessarily follows from the rule that, on demurrer to a complaint, every reasonable intendment and presumption must be given effect in support of it. Morse *v.* Gilman, 16 Wis. 504; Miller *v.* Bayer, 94 Wis. 123, 68 N. W. 869; South Bend Chilled-Plow Co. *v.* George C. Cribb Co., 97 Wis. 230, 72 N. W. 749; Kliefoth *v.* Iron Co., 98 Wis. 496, 74 N. W. 356; Martens *v.* O'Connor, 101 Wis. 18, 76 N. W. 774.

Contributory Negligence Disclosed by Complaint.

Applying the foregoing to the facts stated in the complaint, it cannot be said that they conclusively show failure of plaintiff to exercise ordinary care, contributing to her injury. We start with the presumption to the contrary; then there are the pleaded facts that plaintiff, in approaching the hatchway, traveled at such an angle with it that the opening was not in her line of vision till she was close upon it and that she was free from negligence. It is by no means certain but that, without any allegation in the complaint that plaintiff was free from contributory negligence, it would state a good cause of action. We are not called upon to go that far. The complaint expressly alleges freedom from contributory negligence.

Same.

The order of the circuit court is affirmed.

MURPHY

*v.*

LEGGETT *et al.*

(*Court of Appeals of New York, Oct. 2, 1900.*)

**Nuisances—Store Platforms within Stoop Limits of Sidewalks.**—An iron platform within the stoop limits of a city street constantly crowded with passing people, about 5 feet wide and 2 feet high, on a level with the entrance to a store, and constructed for the purpose of loading and unloading goods taken into and from the store, is not a nuisance *per se*.

**Same—Same—Reasonable Use—Question for Jury.**—Where there is evidence tending to show that the proprietors of such store were engaged in taking goods into the store by means of skids running from trucks to such platform across the sidewalk nearly every hour in the day, and that it took from 10 to 15 minutes to unload a truck, it is a question for the jury whether such use of the platform and sidewalk was reasonable and necessary, and, therefore, lawful.

**Same—Same—Obstruction of Sidewalk—Fall on Platform—Proximate Cause.**—If such use of the platform and sidewalk was not reasonable and necessary, and, therefore, a nuisance, it was the proximate cause of personal injuries resulting from a fall caused by the slippery condition of the platform, if the person injured was using the platform as a passageway because of such unlawful obstruction of the sidewalk.

APPEAL by defendant from First department appellate division supreme court. *Affirmed.*

*Tallmadge W. Foster*, for appellants.

*Anson B. Cole*, for respondent.

HAIGHT, J. This action was brought to recover damages for a personal injury. The defendants occupied a building on West Broadway, between Franklin and Varick streets, in the city of New York, in which they carried on a wholesale grocery business. On the West Broadway side they had constructed a platform about 5 feet

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wide and 2 feet high on a level with the entrance to their store, with three steps on either end by which they could enter their building. The platform was constructed of iron, and was within the stoop limit of the street. On the 19th day of January, 1894, at about 8 o'clock in the morning, the plaintiff, in company with her sister Maggie and a Miss Hare, was passing along West Broadway to her place of work. On reaching the defendants' premises she found the sidewalk blocked by two wagons or trucks, one backed across the sidewalk up against the platform, and the other backed into the gutter with skids running from the wagon to the platform across the sidewalk. The wagons were loaded with goods, and it would take about 15 minutes to unload such wagon. Finding the sidewalk thus obstructed, the plaintiff, leading, passed up the southerly steps to the platform, followed by her companions, and thence along the platform to the northerly end, at which place she slipped on some fresh mud, or other slippery substance, and fell from the top step of the platform down the remaining steps to the sidewalk, dislocating her right ankle, and causing the injury for which this action was brought. It appeared upon the trial that the platform had been swept that morning at 7 o'clock, and whatever mud there was upon it had been tracked there by persons passing over the platform. The trial court charged the jury that the platform was not a nuisance *per se*, but submitted to the jury two questions: First, were the defendants guilty of negligence? and, second, was the use made by the defendants of the sidewalk and platform unnecessary and not required by the exigencies of their business, and was such use unreasonable and the proximate cause of the plaintiff's injury? The jury found a verdict in favor of the plaintiff, which has been affirmed by the appellate division, two of the members of that court dissenting. All of the judges of the appellate division appear to have been of the opinion that no negligence was shown on the

part of the defendants, and that no recovery could be sustained upon that ground. The defendants, however, took no exception to the submission of that question to the jury, and a reversal consequently cannot be placed upon that ground. Some of the judges of the appellate division evidently reached the conclusion that the platform constructed in front of the defendants' premises was a nuisance. We do not so consider it. It is, as we have seen, a permanent structure of iron, wholly within the stoop limit, having steps at either end, at which persons may enter the building. Had the steps been in front of the platform, the approach would have been similar to a thousand other places in the same city, in which no claim of a nuisance has ever been made or entertained.

Nuisances—Store Platforms within Stoop Limits of Sidewalks.

We think, however, that this judgment may be sustained upon the ground that it was a question of fact for the determination of the jury whether the use made by the defendants of their platform and the sidewalk in front was reasonable and necessary in the conduct of their business. This view was entertained by the trial judge, and he fairly submitted the question to the jury. It is true that persons engaged in business in a city have the right to use the streets and sidewalks for the purpose of unloading and loading goods that have to be taken into and from their buildings and storehouses. It is also true that highways and sidewalks may be temporarily blocked when necessary. A person engaged in constructing a large building upon a street may have to make necessary excavation for its foundation, and transport to it the iron and stone used in its construction. Heavy machinery and large safes may be moved into the buildings, taking considerable time, all of which necessarily interrupts and causes inconvenience to the public in the use of the highway. The municipalities may doubtless provide rules or regulations controlling the manner and times in which these interruptions

Same—Same—Reasonable Use—Question for Jury.

may be made. They must be necessary, temporary, and reasonable; for no person can be permitted to permanently or unreasonably occupy the highway to the detriment of the public. The question, therefore, always is as to whether the use is necessary, temporary, and reasonable. In this case the evidence tended to show that the defendants permitted trucks loaded with goods to be backed across the sidewalk so as to avoid the necessity of unloading the goods upon the walk, and then transferring them across the walk into the store. They were engaged in taking in goods from about 8 o'clock in the morning until 6 o'clock at night. Some evidence tends to show that they received goods nearly every hour during the day, and that it took from 10 to 15 minutes to unload a truck. In the case of Welsh *v.* Wilson, 101 N. Y. 254, 4 N. E. 633, it was held that a merchant, in removing cases of merchandise from his store had the right to place a pair of skids from a truck across the sidewalk to the steps of his store, and that a person passing along the walk, who undertook to pass around the skids by the steps to the door, and in so doing slipped and was injured, could not recover. In that case the walk had been occupied but two or three minutes, and it would take but two minutes more to complete the loading. It was held that the use made of the sidewalk was necessary and reasonable. While we approve fully of the conclusion reached in that case under the facts there disclosed, it should not be understood as authorizing the practical obstruction of a street for the greater portion of the time, or as establishing a hard and fast rule which must control in all cases. Places and circumstances widely differ. That which would but slightly inconvenience the public in one place might in another very seriously impede and discommode travelers. The use by a merchant of a back street but little traveled might be reasonable and justified, while a like use of a main thoroughfare, constantly crowded with passing people, would become at once unreasonable, and a nuisance that could not be tolerated. Reasonable use, therefore, is ordi-

narily a question of fact, depending upon its being temporary and necessary, having reference to time, place and circumstances. Callanan *v.* Gilman, 107 N. Y. 360, 365, 14 N. E. 264.

Same—Same—Construction of Sidewalk—Fall on Platform—Proximate Cause.

The proximate cause of an injury may exist without any person being liable for the injury. Liability exists where a person has created a nuisance which becomes the proximate cause, or has been guilty of negligence which contributed to the causing of the injury. A person who should run against the steps of a dwelling house, and receive an injury, could not recover of the owner if the steps were within the stoop line. If, however, the owner should obstruct a street so as to constitute a nuisance, and a person was injured by reason thereof, a recovery could be had. In this case the plaintiff fell down the steps of the defendant's platform. The steps, therefore, with the mud thereon, became the direct cause. The defendants were under no obligation, upon any theory of negligence, to furnish her a safe passageway; but if the use of the sidewalk and platform by them was a nuisance, and she was injured by reason thereof, in the manner described, it constituted proximate cause. Cohen *v.* Mayor, etc., 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406. We think the judgment should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, VANN, and CULLEN, JJ., concur. BARTLETT and LANDON, JJ., dissent.

Judgment affirmed.

## CITY OF GOSHEN

*v.*

## ALFORD.

(*Supreme Court of Indiana, Oct. 26, 1899.*)

**Streets—Injury by Falling into Hole—Liability of City.***—It was the duty of the defendant city to keep its streets in a reasonably safe condition for the use of the public by night as well as by day, and if it opened and excavated a dangerous hole on the line of a street in removing a hitching post, and negligently left the same open, uncovered, and unguarded, and plaintiff, while traveling on the street in the nighttime, exercising due care, and having no knowledge of the existence of the hole, without fault on his part, fell into the same, thereby injuring himself, the city was liable for his injuries.

**Authority of Officer.**—Such hitching post was removed by the city marshal, and a statute authorized him to do such work when required by the mayor or committee on streets, and the bill of expenses for the work was made out by the marshal, presented to the proper city authorities, and paid by the city. *Held*, that the presumption was that the marshal was properly authorized to do the work.

**Excessive Verdict.**—It could not be held that the amount of the verdict indicated that the minds of the jurors were influenced by improper motives or feelings.

APPEAL by defendant from Elkhart county circuit court. *Affirmed.*

*W. J. Davis, A. A. Zook, E. E. Mummert, W. H. Charnley*, and *Chas. C. Black*, for appellant.

*E. A. Dausman* and *Baker & Miller*, for appellee.

DOWLING, J. This is an action for a personal injury alleged to have been sustained by the appellee by reason of the culpable negligence of the appellant in creating a nuisance on one of its streets. A demurrer to the complaint was overruled, and an answer in denial was filed. On motion of the appellant, the jury were

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*See generally, *note*, 1 Mun. Corp. Cas. 58 *et seq.*

directed to return a special verdict. Appellant's motions for judgment in its favor on the special verdict and for a new trial were overruled. At the suggestion of the court, a remittitur of a portion of the damages awarded him was entered of record by the appellee, and judgment was rendered in his favor for the residue. Exceptions to the several rulings of the court were properly saved. The errors assigned are the decisions of the court overruling the demurrer to the complaint, its refusal to render judgment for the appellant on the special verdict, and its denial of a new trial. The complaint stated, in substance, that on the 7th day of November, 1895, the city of Goshen, by its servants and agents, opened and excavated a hole on the line of Washington street, at a point between Main and Fifth streets in said city, said Washington street being then and there one of the public streets of and in said city, and negligently left the same open, uncovered, and unguarded; that in the nighttime, and while the plaintiff was traveling on, over, and upon said street, exercising due care, and having no knowledge of the existence of said pit and hole, without fault on his part, he fell into the same, thereby injuring himself, etc.

Streets—Injury by Falling into Hole—Liability of City.

It was the duty of the appellant, the city of Goshen, to keep its streets in a reasonably safe condition for the use of the public by night as well as by day. If it disregarded this obligation, and by its servants or agents created a dangerous nuisance on one of its streets, and if, in consequence of such neglect, a person lawfully upon such street, exercising proper care, who had no knowledge of the existence of such nuisance, and who was himself free from fault, was injured thereby, the city was liable. It appears from the averments of the complaint that the appellant did, by its agents and servants, create such a nuisance; that the appellee was ignorant of its existence; that he was exercising due care; that he was injured by the wrongful act of the city in leaving open and unguarded, in the nighttime, a deep pit on one of its public streets, and that the appellee sustained such injury without

fault on his part. The statutes of this state gave to the common council of the city of Goshen control over the streets and alleys of that city, and, whether it had the right to erect iron hitching posts near the edge of the sidewalk or not, it certainly had the right to remove hitching posts already there, if they had become obstructions to travel, or were rotten, unsightly, or unsafe. The charge in the complaint is that the city removed the wooden post, and left the pit exposed. This averment rendered an allegation of notice to the city of the existence of the nuisance unnecessary. It was bound to take cognizance of a nuisance created by itself. The allegations of the complaint that the appellee had no knowledge of the existence of the excavation or hole in the edge of the sidewalk are not inconsistent with the other matters stated, and it cannot fairly be inferred from anything in the pleading that the appellee knew that the hole was there, or that it had been left in such a condition as to render the street unsafe. There was here, to use the language of LORD ELLENBOROUGH in Butterfield *v.* Forrester, 11 East 60, "an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." In our opinion, the complaint was sufficient, and the demurrer to it was properly overruled.

In the next place, the appellant complains of the refusal of the court to render judgment in its favor upon the special verdict. Every fact essential to the recovery of the appellee is found by the special verdict, and none of the facts found is inconsistent with his right so to recover. Some of the facts found are, perhaps, evidentiary only, or are mere conclusions of law; but, disregarding every objectionable answer in the verdict, amply enough remains, as we think, to entitle the appellee to judgment. The following is a summary of the facts so found: On and before November 7, 1895, the city of Goshen erected and maintained a line of wooden hitching posts along the south side of Washington street, one of the public streets of that city. On said day said city, by its workmen and agents, proceeded to remove said posts, and to substitute

iron posts in their stead. One of said wooden posts, which stood in front of a grocery store building occupied by one Hoffman, was so removed, and a hole from two to four feet deep and one foot wide, with perpendicular sides, was left where the post had stood. On the evening of said day the city of Goshen, by its workmen and agents, abandoned said work, leaving the said pit open, and without any barrier or signal of danger near it. Said city also left, at the same place, some large stones surrounding said hole, and without barrier or danger signal. On said day appellee was at work in said Hoffman's store as a salesman, and at about 6 o'clock in the evening of said day he walked from the store to the street in front thereof for the purpose of entering a carriage to be driven to his home. At that time it was dark, and drizzling rain. The sidewalk was about 15 feet in width, and the hole or pit was within a few inches of its outer edge, and from 5 to 10 inches below the top of the same. The appellee did not know of the existence of the said hole or pit, or of the stones surrounding it, or of any danger in that vicinity. Appellee left said store, and walked out to the street, to enter the buggy, as a reasonably prudent man, under similar circumstances, would have done. He stepped into the hole with his right foot, and was thrown violently to the ground. In his fall appellee ruptured certain ligaments of his knee, dislocated and fractured his kneecap, and sustained other severe injuries, external and internal. The place on said street where appellee attempted to enter said carriage was a proper one for the use of the public. The appellant was negligent in leaving the hole unguarded, and the pile of stones near to the same. Appellee did not in any manner contribute to his injuries. He was making from $8 to $10 per week, and was a competent salesman. He has not been able to earn anything since he was injured, and his injuries are of a permanent character, and will cause him great pain for the rest of his life. Appellee expended $195 for medical attendance and services. On the day of the accident he knew that the old wooden posts were being taken

out, and that iron posts were being put up in front of Hoffman's store. At the time of the accident there was no light from public lamps at the place where appellee was injured. He could not have seen the hole if he had looked for it. Lamps were burning in Hoffman's store when the accident occurred, but the place where appellee was injured was not so lighted that a person using ordinary care and caution could have seen the hole and the stones. The work of erecting the hitching posts was authorized and done by the order of the city council. The city marshal had knowledge of the hole before the accident occurred. It will be seen that the special verdict finds that the work was done by the authority and order of the common council; so that, upon the consideration of the verdict, there can be no doubt as to the responsibility of the city for the existence of the hole in the street. Upon the facts so found the court could not do otherwise than overrule appellant's motion, and render a judgment for appellee.

The last error assigned is the refusal of the court to grant a new trial. Questions as to the admissibility and competency of evidence are discussed by counsel for appellant, but, upon a careful examination of the testimony so admitted and excluded, we are of the opinion that the rulings of the court were correct. Neither can we discover any material variance between the allegations of the complaint touching the character and extent of the injuries sustained by the appellee and the proof of the same.

Another of the grounds of the motion for a new trial is that the verdict is not sustained by sufficient evidence, and is contrary to law. The only question of real difficulty in this case arises upon the evidence as to the connection of the city with the nuisance causing the injury. The complaint directly charges, and the special verdict expressly finds, that the work of removing the wooden post, and leaving the dangerous hole or excavation in the street, were the acts of the appellant, the city of Goshen. The evidence given on this point was as follows: "Q. 1. You may state your name.

A. John E. Rigney. Q. 2. What is your business? A. City marshal. Q. 3. How long have you been city marshal? A. A year and nine months. Q. 4. City marshal of what city? A. Goshen, Elkhart county. Q. 5. You was city marshal on the 7th day of November, 1895? A. Yes, sir. Q. 6. State what, if anything, you did with reference to removing, or causing to be removed, a line of wooden posts, hitching posts, along the south side of Washington street, in the city of Goshen? A. On the 7th day of November? Q. 7. Yes, sir; on the 7th day of November, 1895. A. Well, there was an old line of hitching posts, or hitching rack, that was partly broken down, and the posts—two of them at the west end—had rotted off, and fell into the gutter, and they had laid that way quite a while; so I was talking with Wilhide and Neidig, and told them we had some iron hitching posts, and asked them if it wouldn't be a good idea to put them in there. Q. 8. Who is Wilhide and Neidig? A. City councilmen. Q. 9. Of the city of Goshen? A. Yes, sir. Q. 10. Was Wilhide on the committee of streets and alleys and sidewalks? A. That I couldn't say. Q. 11. Well, you consulted with Wilhide and Neidig with reference to this matter? A. Yes, sir. Q. 12. And then what did you do with reference to removing these old wood posts? Did you cause them to be removed? A. Yes, sir. Q. 13. Did you employ men for that purpose? A. Yes; Jacob Ogle and William Brown. Q. 14. Did you go round there yourself to see whether this work was being done? A. Yes, sir. Q 15. Do you know that the work was done by these men that you employed? A. Yes, sir. Q. 16. For whom did you employ these men? A. I didn't say at the time who employed them. I just told them— Q. 17. They weren't working for you personally? A. Working for me? Q. 18. As marshal of the city? A. Yes, sir. Q. 19. They were working for the city? A. That is where they got their pay. Q. 20. After they did this work, you made out a bill for their labor? A. Yes, sir. Q. 21. And O. K.'d the bill as marshal of the city? A. Yes, sir. Q. 22. And the bill was paid by the city? A. Yes,

sir." If there was no evidence here except that the city marshal caused the work to be done, and the post to be removed, after consultation with two members of the city council, we would feel compelled to decide that the city was not responsible for the unauthorized act of the marshal. It is said in Cook *v.* City of Anamosa, 66 Iowa 427, 23 N. W. 907: "There was evidence tending to show that the city marshal was informed, a few days before the accident, of the defect in the walk, but no steps were taken by the city to repair the walk until after the injury occurred. * * * The marshal was not charged, either by statute or ordinance, with any duty with reference to the inspection or repair of streets or sidewalks. By an ordinance of the city it was made the duty of the street committee to examine the sidewalks, and they were empowered to order that any sidewalk be repaired by the property owner on whose property it abutted, and they had authority to direct the marshal to notify the property owners to make the repairs which they ordered. But he was not charged with any duty, or clothed with any power, to make repairs, or determine that any should be made. He was simply a peace officer, having power to make arrests, and to serve such writs and execute such processes as should be directed to him. * * * The city would undoubtedly have been affected by any notice of the defect given to its mayor, for he is its executive officer, and is clothed with general executive powers. It would likewise have been affected by notice to its council, for that body is charged with the duty of making provision for the repairs and improvements of its streets and walks; and, as the duty to inspect the sidewalks and order their repair was specially imposed upon the street committee, the city would doubtless have been affected by any notice of the defect which had been given to that committee, or the individual members of it. But we think the circuit court correctly held that it was not affected by the notice given to the marshal. That officer, as we have seen, was charged with no duty with reference to the matter. He was not required, in

the discharge of any of his official duties, to repair the defect; nor had he any power to order such repair to be made by any other person; nor was he required, in the discharge of any official duty, to communicate to the mayor, or council, or street committee the information which he had received concerning the defect. It cannot be said, then, that he was negligent in not communicating it, nor can the city be charged with negligence because of his failure to take any action with reference to it." But the question here is not one of notice to the city through its marshal or members of its common council, but whether the removal of the post, and the leaving open the hole and excavation, were the acts of the city, or of its agents, for whose torts it is responsible. The general statute for the incorporation of cities makes the marshal the chief ministerial officer of the corporation. Burns' Rev. St. § 3510 (Rev. St. 1881, § 3075; Horner's Rev. St. § 3075). If required to do so by the common council, or by the mayor, or committee on streets, properly authorized thereunto, it would become his duty to remove an obstruction from a street, and such obstruction might consist of a hitching post, or a decayed hitching rack. In this case the marshal did perform a ministerial act on the part of the city, and did it in such a negligent manner that a nuisance was created, resulting in an injury to the appellee. The bill of expenses for the work was made out and approved by the marshal, was presented to the proper city authority, and was paid by the city. Under these circumstances we must presume that the act of the marshal in employing laborers and directing them to remove the posts was authorized by the common council, or by its committee on streets, and, therefore, that the city became responsible for the injury resulting from the negligent manner in which the work was done. The fact that the men employed by the marshal were paid by the city for doing the work was neither denied nor explained. If the marshal had been acting without authority, it is not at all probable that the city would have paid a bill incurred by him

Authority of Officer.

without the knowledge of the mayor, or common council, or street committee. We cannot escape the conclusion that the payment of the bill for this work by the city implied the previous authorization of the marshal to employ the laborers, and to cause the work to be done. In our opinion, the evidence is sufficient to sustain the verdict.

The last point made on behalf of the appellant is that the damages are excessive. While the amount assessed was large, it must be borne in mind that the injuries of the appellee were very serious, and were shown to be permanent in their character. The jury found by their special verdict that the appellee was disabled from performing manual labor, and that he would suffer great physical pain the remainder of his life. We cannot say that the amount allowed him indicates that the minds of the jurors were influenced by improper motives or feelings, or that it is evident that they overestimated the amount necessary to compensate the appellee for the injury he sustained. Judgment affirmed.

Excessive Verdict.

BAKER, J., was absent.

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FINNEGAN

*v.*

CITY OF SIOUX CITY.

(*Supreme Court of Iowa, Oct. 17, 1900.*)

**Streets—Person Injured While Walking upon Driveway—Liability of City.**—A person has the right to walk upon the driveway of a city street for the purpose of putting a package in a vehicle; and if he is injured while doing so, by reason of a defect which rendered the driveway unsafe for such use, the city is liable.

**Same—Same—Same—Sufficiency of Evidence.***—There was evidence tending to show that the hole into which plaintiff stepped,

*See generally, City of Circleville *v.* Sohn (Ohio), 1 Mun. Corp. Cas. 50, and *note*, 58 *et seq.*

Finnegan *v.* City of Sioux City

while walking upon the driveway of a street in the defendant city for the purpose of putting a package into a vehicle, was near the sidewalk line; that it was six inches wide and eight inches deep, and at the time of the accident was filled with slush caused by melted snow; and it had existed for about three months prior to the accident, and the city had notice thereof. *Held*, that the finding that the city was negligent was warranted by the evidence.

Same—Same—Contributory Negligence—Question for Jury.—The time of the accident was between 7 and 8 o'clock of a November evening. There were lights in adjacent stores, and a street lamp near by was burning. Plaintiff did not know of the existence of such hole, although he was well aware that the street paving was rough. He was carrying a heavy jar of butter to a vehicle, and was proceeding as one ordinarily would under the circumstances. *Held*, that whether plaintiff was guilty of contributory negligence in stepping into such hole was a question for the jury.

Same—Same—Notice of Injury—Evidence—Copy of Notice.—In such an action where it is shown that the original notice to defendant of the time and place of injury required by statute has been lost, a copy of the notice is admissible in evidence.

Same—Same—Same—Evidence.—Defendant offered evidence of the service of the notice of the time and place of the injury offered in evidence by plaintiff; and the return of such service was upon such notice. *Held*, that the notice was properly admitted in evidence.

Harmless Error.—Harmless error is not reversible error.

Personal Injuries—Privileged Communications.—Under section 4608 of the Code of Iowa, relating to privileged communications, in such an action, it cannot be shown by plaintiff's attending physician that plaintiff was suffering from delirium tremens at the time he was being treated for his injuries.

APPEAL by defendant from Woodbury county district court. *Affirmed.*

*F. E. Gill*, for appellant.

*E. P. Farr* and *G. H. Flynn*, for appellee.

WATERMAN, J. Plaintiff, while carrying a package to put in the buggy of a friend, who had stopped in the street a short distance from the curbstone, stepped into a hole in the driveway and fell, causing the injuries for which he sues.

1. Plaintiff had a right to go upon the driveway of the

street for the purpose he did. If his injuries were caused by a defect that rendered the driveway unsafe for usage as such, certainly the city would be liable. Lamb *v.* City of Cedar Rapids (Iowa), 79 N. W. 366; Baker *v.* City of Grands Rapids (Mich.), 69 N. W. 740. There was evidence tending to show that the hole into which plaintiff stepped was near the sidewalk line; that it was about three feet long, four to six inches wide, and eight inches deep, and at the time of the accident was filled with slush caused by melted snow. The trial court was also warranted in concluding that the defect had existed for some three months prior to the accident, and that the city had notice thereof. The finding that defendant was negligent was manifestly justified. The defect, if as shown by the evidence to which we have referred, was dangerous to those using the street for driving purposes.

Streets—Person Injured While Walking upon Driveway—Liability of City.

Same—Same—Same—Sufficiency of Evidence.

2. Was plaintiff guilty of contributory negligence? The time of the accident was between 7 and 8 o'clock of a November evening. There were lights in adjacent stores, and a street lamp near by was burning. Plaintiff did not know of the existence of this hole, although he was well aware that the street paving was rough. The package he was carrying was a heavy jar of butter. He was proceeding as one ordinarily would under the circumstances. Bearing in mind that it was not negligence *per se* for him to walk in the street where he did (Baker *v.* City of Grand Rapids, *supra*), we must hold that the question of his negligence was one of fact, and the finding of the trial court has the force and effect of the verdict of a jury. Such finding having substantial support in the evidence, under our well-established rule we shall not disturb it. Buggy Co. *v.* Cathels (Iowa), 81 N. W. 164.

Same—Same—Contributory Negligence—Question for Jury.

3. This action was not brought within six months after the accident, and it is contended that the evidence does not

show that notice of the time and place of injury was served on defendant within 90 days after the injury, as required by section 1, c. 25, Acts 22d Gen. Assem. The condition of the record on this subject is as follows: Plaintiff offered in evidence such a notice (Exhibit A), proper in form, so far as appears. It was objected to by defendant as being a copy, and no ruling was made on the objection. As the loss of the original had been shown, the court might properly have overruled the objection; and, in view of what further occurred, we may treat it as having been overruled, and the notice as in evidence. Later, defendant offered evidence of the service of this notice, which service was in compliance with law. The evidence showed the return of this service to have been upon Exhibit A. We think this a sufficient showing that the trial court accepted the notice as in evidence, and we shall do the same.

Same—Same—Notice of Injury—Evidence—Copy of Notice.

Same—Same—Same—Evidence.

4. Complaint is made because the court, in a number of instances, reserved rulings on defendant's objections to evidence, and did not, so far as the record discloses, ever pass upon them. Defendant was doubtless entitled to rulings, and we can see no reason why the court did not pass upon the objections when made. But we think the testimony to which objections were made must be treated as in the case. Assuming, then, that each ruling was adverse to defendant, we do not discover any prejudicial error. The failure to rule, therefore, will not warrant a reversal.

Harmless Error.

5. Plaintiff, in answer to a question, had said that he was not treated for delirium tremens at the time of treatment for his injury. One Dr. Bergen was his attending physician. He was called as a witness by defendant, and it was sought to be shown by him that defendant at this time had delirium tremens. This testimony was excluded by the court, and properly. The matter asked for was in the nature of a confidential communication, privileged under section 4608 of the Code. Facts

Personal Injuries—Privileged Communications.

learned by a physician while in the discharge of his duties as such are within this section. Prader *v.* Association, 95 Iowa 159, 63 N. W. 601. In Bradner, Ev. 56, the author, speaking on this subject, states the rule as follows: "They [physicians] may state the fact of their attendance upon the patient, but not his condition, even as regards sobriety. * * *" We discover no serious error in the matters presented, and the judgment of the district court is affirmed.

GRANGER, C. J., not sitting.

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COWIE *et ux.*

*v.*

CITY OF SEATTLE.

(*Supreme Court of Washington, July 18, 1900.*)

**Sidewalks—Personal Injuries—Constructive Notice of Defects.***—A city cannot escape liability for personal injuries caused by a defect in a sidewalk, on the ground of its want of notice of the defect, if the defect had existed for such a length of time that the city authorities, by the exercise of ordinary vigilance, could have discovered it in time to prevent the accident.

**Same—Same—Contributory Negligence—Knowledge of Defect.**—In an action for such injuries, it was proper to refuse to instruct that the jury might disregard the fact that plaintiff knew of the defect, but failed to think of it while walking on the sidewalk at the time of the accident, if he otherwise exercised ordinary care; as the question whether he was exercising ordinary care could not be properly determined by the jury without taking into consideration all the facts and circumstances in evidence.

**Same—Same—Same—Same.**†—In such an action, the fact that the person injured knew of the defect, but failed to bear it in mind when approaching the defect, does not necessarily establish contributory negligence.

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*See Devenish *v.* City of Spokane (Wash.), 2 Mun. Corp. Cas. 46, and *foot-note.*

†See City of Streator *v.* Chrisman (Ill.), *ante*, 225, and *foot-note.*

Cowie v. City of Seattle

**Same—Same—Same.**—In such an action, it is error to instruct that any contributory negligence will prevent a recovery, as the words "any negligence" comprehend slight negligence, and "slight negligence" is a want of extraordinary care and prudence.

**Same—Same—Knowledge of Defect.**—A person perfectly familiar with the condition of a sidewalk in which a defect exists has no right, while using it, to act on the ordinary presumption that it is in good condition and safe.

APPEAL by plaintiff from King county superior court. *Reversed.*

*Fred H. Peterson*, for appellants.

*W. E. Humphrey* and *Edward Von Tobel*, for respondent.

ANDERS, J. Tenth avenue South is one of the public streets of the city of Seattle, extending south from Main street in said city. Jackson street is the next street south of and parallel to Main street, and south of that is Lane street. On the west side of Tenth avenue South there was a wooden sidewalk about eight feet wide, and upon this sidewalk, between Main and Jackson streets, there was situated a board or plank "incline" extending from the door of a blacksmith shop, at the inner side of the walk, outward for a distance of four or five feet. The space between the incline and the outer edge of the sidewalk was, it appears, kept in a reasonably safe condition for pedestrians. This incline had been in existence for a period of four or five years prior to the time hereinafter mentioned, during all, or nearly all, of which time the appellant W. H. Cowie resided on the corner of Lane street and Tenth avenue South, and on the west side of the avenue, and had knowledge of the incline, and usually passed by it on the sidewalk in going to and returning from his place of residence. He frequently, however, traveled upon the sidewalk on the opposite side of the avenue, and which was in good condition, and without any known obstructions. The evidence clearly shows that at about 11 o'clock on the night of April 16, 1896, Mr. Cowie, while on his way home from "down town," stumbled against and fell upon this incline,

Case Stated.

and was thereby injured. He admitted while upon the witness stand that he knew of the obstruction on the sidewalk which caused him to fall, and frankly testified that he was not thinking of it at the time he came in contact with it. It was dark at the time, and there was no artificial light upon the street in that locality. There was evidence to the effect that the street commissioner and at least one member of the city council had notice of the obstruction long prior to the time of the accident. Indeed, there is some evidence in the record tending to show that the incline was originally placed upon the sidewalk by permission of the city. In the month of October, 1896, the said W. H. Cowie presented to the city his claim for damages, and filed the same with the city clerk, which claim was rejected by the city council. He thereupon instituted this action against the city to recover damages for the injuries thus sustained, alleging negligence on the part of the city in failing to keep the sidewalk in a safe condition for travel. The city, in its answer to the complaint, denied the alleged negligence on its part, and pleaded contributory negligence on the part of the plaintiff as a defense to the action. The plaintiff at the trial fairly established by his evidence the facts above set forth. No testimony was offered on behalf of the defendant city, and, after the jury were instructed by the court, they returned a verdict for the defendant, upon which judgment was subsequently entered. This is an appeal from that judgment.

There is no controversy regarding the facts in this case, but it is alleged by the appellants that the trial court erred in giving certain instructions to the jury at the request of the respondent, and in refusing to give certain other instructions requested by appellants. The refusal of the court to give to the jury the following instructions is especially urged as error by the appellants: "(3) But if you should find that the street commissioner did not have actual knowledge of the existence of this obstruction, then I instruct you that the law is that, if the incline was in existence for such a

length of time that the city authorities, by the exercise of ordinary vigilance, would have discovered it in time to prevent the accident, the city cannot escape liability for want of notice. Under such circumstances the law imputes notice. Failure to discover a dangerous defect in a public street within a reasonable time is itself negligence. (4) The duty of the city was to exercise ordinary care to keep its sidewalks safe for travel, and it is for you to determine whether or not the sidewalk complained of was reasonably safe, considering the condition it was in as shown by the testimony in this case. If you find from the evidence that the plaintiff knew of the existence of the incline, but had forgotten about it, or failed to think of it, while walking along, plaintiff will, nevertheless, be entitled to recover if he otherwise exercised ordinary care while using the sidewalk." Appellants also allege that the court erred in giving to the jury the following instructions at the instance of the respondent: "(3) You are further instructed that if said Cowie had knowledge at the time of such injury of the defective condition of said walk (if you find that it was in an unsafe and defective condition), then it was incumbent upon him to use and exercise a degree of care and caution commensurate with the dangers to be encountered; and if it is proven that he, at the time of the accident, forgot such defect, that fact alone would not avail him as an excuse." (9) The court further instructs you that, although you find that the sidewalk in question was defective and unsafe at the point where plaintiff W. H. Cowie was injured, and at said time, yet if you further find that at said time he knew of such defective condition, but at the time of the accident forgot such fact, and that it was by reason that he forgot such defective condition that he was injured,—that is, that by reason of such forgetfulness he failed to exercise a degree of care and caution commensurate with the danger to be encountered,—and that such failure on his part to so remember was the approximate or direct cause of his injury, then plaintiff cannot recover, and the fact that the sidewalk was defective and unsafe would be imma-

terial." Instruction No. 7 requested by the respondent is also objected to, and is as follows: "(7) You are further instructed that if you find from a preponderance of the evidence that the plaintiff W. H. Cowie was himself guilty of any negligence, and that such negligence was itself a cause of his injury, then you have no right to take into consideration the question whether the plaintiff W. H. Cowie or the defendant was more or less negligent in the premises; and if you find that said W. H. Cowie was so guilty of negligence which directly caused such injury, then it is your duty to find for the defendant, and it would make no difference in such cases whether any defect in the sidewalk assisted in causing such injury." The court, of its own motion, instructed the jury that knowledge on the part of the street commissioner would be equivalent to actual notice to the city in this case. This instruction, so far as it goes, undoubtedly states the law correctly; but, inasmuch as the city could not escape liability for want of notice if it had either actual or constructive notice of the condition of the sidewalk, we are of the opinion that the learned judge should have given to the jury the third instruction requested by the appellants. This request clearly states the law as previously announced by this court. Lorence *v.* City of Ellensburgh, 13 Wash. 341, 43 Pac. 20. But we think that appellants' fourth request was properly refused, for it does not, as a whole, correctly state the law. The last part of the proposed instruction states that, if the plaintiff knew of the existence of the incline, but had forgotten it, or failed to think of it, while walking along, he will nevertheless be entitled to recover if he otherwise exercised ordinary care while using the said walk. By this request the court was asked to charge the jury, in effect, that they might disregard the fact that the plaintiff knew of the incline, but failed to think of it while walking on the sidewalk, if he otherwise exercised ordinary care. This is not the law. The only question to be determined by the jury on the issue of contributory

Sidewalks—Personal Injuries—Constructive Notice of Defects.

Same—Same—Contributory Negligence—Knowledge of Defect.

negligence was whether the plaintiff, at the time of the accident, was exercising such care and caution as a person of ordinary prudence would use under similar circumstances; and that question could not properly be determined without taking into consideration all the facts and circumstances in evidence, including the plaintiff's knowledge of the condition of the sidewalk, and his forgetfulness of its condition at the time of his injury. This court has several times held that one's previous knowledge of a defect or obstruction in a street or sidewalk, whereby he is injured, will not, as a matter of law, necessarily preclude him from recovering damages for such injury on the ground of contributory negligence. See McQuillan *v.* City of Seattle, 10 Wash. 464, 38 Pac. 1119; Bothell *v.* Same, 17 Wash. 263, 49 Pac. 491; Smith *v.* City of Spokane, 16 Wash. 403, 47 Pac. 888. And this ruling is amply supported by the authorities. 15 Am. & Eng. Enc. Law (2d Ed.) p. 468; 1 Shear. & R. Neg. (5th Ed.) § 376; Maloy *v.* City of St. Paul, 54 Minn. 398, 56 N. W. 94; City of Wichita *v.* Coggshall, (Kan. App.), 43 Pac. 842; Germaine *v.* City of Muskegon (Mich.), 63 N. W. 78; Jones, Neg. Mun. Corp. p. 426; Village of Clayton *v.* Brooks (Ill. Sup.), 37 N. E. 574. We have also, in common with many other courts, decided that a mere failure to remember a known defect in a way does not necessarily constitute contributory negligence if it results in injury. McQuillan *v.* City of Seattle, *supra*; Smith *v.* City of Spokane, *supra*. But there is nothing in either of these decisions that would have justified the trial court in giving to the jury the instructions in question.

We are clearly of the opinion that the court erred in giving to the jury the third instruction proposed by the respondent. It may be true, as an abstract proposition, that one's failure to remember a defect in a sidewalk, of which he had knowledge, will not alone avail him as an excuse for negligence, if that was the idea the court intended to convey to the jury. But it was for the jury, and not the court, to determine what effect the appellant's forgetfulness should have in the con-

sideration of the question of his negligence. It having been admitted by the appellant W. H. Cowie that he was aware of the existence and location of the incline, and that he failed to bear it in mind at the time of the accident, the jury were warranted, by this instruction, in concluding, and may have concluded, that the appellant was bound, at his peril, to remember it, and, not having done so, was guilty of negligence, and therefore had no right to recover in this action. Instead of saying to the jury that, if said Cowie forgot the defect, that fact would not avail him as an excuse, the learned judge should have told them, in substance, that the failure of appellant W. H. Cowie to remember the obstruction was a proper matter for their consideration, in connection with all other facts and circumstances in the case, as bearing upon the question whether he did or did not exercise ordinary care and prudence. This instruction, it seems to us, is clearly an invasion of the province of the jury, and is, therefore, erroneous.

The ninth instruction given at the request of the respondent is subject, in part at least, to the same objections as the one last considered, and, besides, it is involved and argumentative, and, in our judgment, was more likely to confuse than to enlighten the jury. "It is generally held that one is not necessarily negligent because, though knowing of the defect, he failed to bear it in mind at the time of approaching it." 15 Am. & Eng. Enc. Law (2d Ed.) p. 472. See, also, McQuillan *v.* City of Seattle, *supra*; Smith *v.* City of Spokane, *supra*; Maloy *v.* City of St. Paul, *supra*; Wheeler *v.* Town of Westport, 30 Wis. 392; Cumisky *v.* City of Kenosha, 87 Wis. 286, 58 N. W. 395; Simonds *v.* City of Baraboo (Wis.), 67 N. W. 40; Barton *v.* City of Springfield, 110 Mass. 131; Weare *v.* Inhabitants of Fitchburg, *Id.* 334; George *v.* City of Haverhill, *Id.* 506; Parker *v.* City of Springfield, 147 Mass. 391, 18 N. E. 70; 1 Shear. & R. Neg. (5th Ed.) § 376. In Maloy *v.* City of St. Paul, *supra*, the court said: "The defect here was not such as would or should have turned the prudent traveler off from

Same—Same—Same—Same.

the walk to seek a better route. * * *. Although advised of the defect, she did not have it presently in mind. Nor is it necessary that the thoughts of a traveler should be at all times fixed upon defects in the street or sidewalk of which he may have notice."

Same—Same—Same.

The seventh instruction which was given to the jury at respondent's request is also erroneous, and is contrary to the doctrine announced by this court in Spurrier v. Railway Co., 3 Wash. St. 659, 29 Pac. 346. In that case the defendant asked the court to instruct the jury that, "if it appears from the evidence that the plaintiff was guilty of any negligence whatever which contributed to cause the injury complained of in this action, or concurred with the negligence of the defendant, if any, in producing it, then your verdict must be for defendant"; and we there held that the instruction was properly refused on the ground that it imposed a greater degree of care on the plaintiff than the law required. The law does not require the plaintiff in an action for personal injuries to be absolutely free from any negligence whatever in order to recover, for such a requirement would impose upon him a duty of exercising extraordinary care and prudence, which is not the standard by which his negligence is measured. All the law requires of the plaintiff in such cases is the exercise of ordinary care under the circumstances surrounding him, and this he may do although he may be guilty of some slight negligence in the broadest sense of that term. The rule upon this subject was so clearly enunciated by the supreme court of Wisconsin in the case of Cremer v. Town of Portland, 36 Wis. 92, that we feel justified in quoting from the opinion therein. In that case the defendant asked the trial court to charge the jury as follows: "(1) There can be no recovery by the plaintiff in this case if the jury believe from the evidence that the plaintiff was guilty of negligence (though it were slight), and such negligence contributed directly to the injury. (2) If the jury believe from the evidence that the plaintiff was guilty of any negligence which contributed

directly or proximately to produce the injury, then and in that case the plaintiff cannot recover." Concerning these instructions the learned court said: "The law is that, if the plaintiff was guilty of any want of ordinary care and prudence (however slight), which neglect contributed directly to produce the injury, he cannot recover. * * * It is not the law that slight negligence on the part of the plaintiff will defeat the action. Slight negligence is the want of extraordinary care and prudence, and the law does not require of a person injured by the carelessness of others the exercise of that high degree of caution as a condition precedent to his right to recover damages for the injuries thus sustained. Both of the rejected instructions (as we understand them) assert this erroneous principle, and were, therefore, properly refused." And MR. BEACH, referring to that part of the opinion in the Wisconsin case above quoted, says: "The weight of the most intelligent authority will, it is believed, sustain this position. Not slight negligence, but any want, however slight, of ordinary care on the part of the plaintiff, is sufficient to defeat the action. This want of ordinary care may, in order to operate as a defense to the plaintiff's action, be, in point of time, either prior or subsequent to the negligence of the defendant, or contemporary therewith." Beach, Contrib. Neg. (2d Ed.) § 20. What we have said respecting this seventh instruction is equally applicable to the second instruction requested by the respondent, in which the jury were told that, "where any one is himself guilty of any negligence which caused or contributed to cause his injuries, then he cannot recover." As we have already intimated, the words "any negligence" comprehend slight negligence, and "slight negligence is a want of extraordinary care and prudence." The instructions requested by the appellants to the effect that a person traveling upon a sidewalk has a right to assume that it is safe for public travel were, under the circumstances, properly refused. Being perfectly familiar with the condition of the sidewalk, Mr. Cowie had no right to act on the ordinary presumption

that it was unobstructed and safe. 15 Am. & Eng. Enc. Law 2d Ed. pp. 468, 469. We assent without hesitation to the proposition urged by the learned counsel for the respondent that when the instructions given by the court to the jury fully cover the whole case, and fairly present the law applicable to the case, it is not error to refuse to give other instructions requested, although such instructions may correctly state the law applicable to the case. But we are unable to assent to the further proposition that the instructions given to the jury in this instance were a fair presentation of the law of the whole case. For the errors indicated, the judgment is reversed, and the cause remanded to the superior court for further proceedings in accordance with this opinion.

DUNBAR, C. J., and REAVIS, J., concur.

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## CITY OF DIXON

v.

## SCOTT.

(*Supreme Court of Illinois, Oct. 13, 1899.*)

**Testimony—Interest in Result—Instructions.**—The instruction, as modified, authorizing the jury to consider plaintiff's interest, in determining the value of his testimony, was more favorable to defendant than it was entitled to.

**Proximate Cause—Instructions.**—In an action for personal injuries resulting from a defective sidewalk, the court properly refused to instruct, in substance, that, in order to make the negligent act of defendant the proximate cause of the injuries, it was necessary that the particular injury, and the particular manner in which it occurred might reasonably have been expected to follow from such negligent act.

APPEAL by defendant from second district appellate court. *Affirmed.*

City of Dixon *v.* Scott

*H. A. Brooks*, *H. S. Dixon*, and *Barge & Barge*, for appellant.

*Morrison & Bethea*, for appellee.

Case Stated.

CARTER, J. The first judgment for the plaintiff in this case was reversed by the appellate court (74 Ill. App. 277), but on the second trial the plaintiff secured another judgment, which has been affirmed. The only questions raised by appellant on this appeal which we can consider relate to the instructions. The action was case for an injury to the plaintiff, caused by a defective sidewalk, and the defendant asked this instruction: "The court instructs the jury that in determining what credit, if any, should be given to the plaintiff's testimony, it is the duty of the jury to take into consideration the interest which the plaintiff has in the result of this suit as a party to this case." The court modified that part of the instruction after the word "testimony" so as to read, "The jury are authorized to take into consideration and consider the interest which," etc., and gave the instruction as modified. Appellant insists here that in this the court erred. The evidence tended to prove that other witnesses testified in the case, who were interested in the result of the suit; and we have held that in such cases it is not error to refuse an instruction which singles out one such witness, and applies to him only this test of credibility. Pennsylvania Co. *v.* Versten, 140 Ill. 637, 30 N. E. 540. True, the modification did not relieve the instruction of this defect, but it changed its peremptory character, and, as given, was, as an entire proposition, more favorable to the defendant than it was entitled to. The court would also have been justified in refusing it altogether for another reason. It is not pretended that the plaintiff was in any way impeached, or that there was any evidence (upon which an instruction could have properly been based) that the jury might refuse to give any credit whatever to her testimony in making up their verdict; yet the instruction in question, by the words "if any,"

contained an implication by the court to the jury that the plaintiff might not be entitled to any credit as a witness. Whether, if the verdict had been against the plaintiff, and she had complained of this instruction, she would have been entitled to a new trial, it is not necessary here to decide, for a defect in an instruction may justify its refusal, but may not be sufficiently harmful to reverse the judgment where the instruction is given. Devlin v. People, 104 Ill. 504. We are of the opinion that the appellant has no ground of complaint in the ruling of the court in giving the instruction as modified. Insurance Co. v. Lapointe, 118 Ill. 384, 8 N. E. 353.

Testimony—Interest in Result—Instructions.

The court decided properly, also, in refusing the defendant's third instruction, having reference to the question of proximate cause of the injury. This instruction would have told the jury that, if "it was not natural or reasonable to expect or anticipate that Mrs. Kost, or any one else, would step on the end of one of said planks, and cause the other end to tip up, and thereby trip or cause the plaintiff to fall, and receive the injury complained of," then the plaintiff could not recover. In order to make the negligent act of appellant the proximate cause of the injury, it was not necessary that the particular injury, and the particular manner in which it occurred, might reasonably have been expected to follow from such negligent act. In 16 Am. & Eng. Enc. Law 438, the author says: "Consequences which follow in unbroken sequence, without an intervening cause, from the original wrong, are natural; and for such consequences the wrongdoer must be held responsible, even though he could not have foreseen the particular results, provided that by the exercise of ordinary care he might have foreseen that some injury would result from his negligence." It would be very unreasonable to make the liability of the defendant depend on the question whether the precise injury complained of, and the manner of its occurrence, ought to have been foreseen. Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285.

Proximate Cause—Instructions.

The refusal to give other instructions asked by the defendant is assigned as error, but we are of the opinion that the assignment is not sustained. It is unnecessary here to mention these instructions in detail. The court gave 16 instructions at the request of the defendant, covering every important phase of the case, and we find none refused, important to the defense, and correct in themselves, which were not rendered unnecessary by those given. Nor can we agree with counsel for appellant that the instructions given at plaintiff's request assumed that the city had notice of the defect in the walk. Besides, the instructions given at the instance of the defendant properly informed the jury of the law on this branch of the case. We find no error, and the judgment must be affirmed. Judgment affirmed.

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## BETHAM

*v.*

## CITY OF PHILADELPHIA.

(*Supreme Court of Pennsylvania, May 29, 1900.*)

**Drains—Negligence—Ultra Vires—Liability of Municipality—Burden of Proof.***—Where a municipal corporation acted wholly outside of its general or special powers, as conferred by charter or by statute, in constructing and maintaining a sluice for the protection of tide water flats, it was not liable for injury to land from overflow by reason of negligence in such construction or maintenance; and, in an action for such an injury, the burden is upon plaintiff to show that the act was within such powers.

**Police Power—Negligence—Liability of Municipality.**—A municipal corporation is not liable for any damages resulting from the improper or negligent exercise of its police power.

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*As to whether a municipal corporation is liable for damages resulting from *ultra vires* acts, see Hoggard *v.* Mayor, etc., of Monroe (La.), 1 Mun. Corp. Cas. 660, and *notes*, 665; Brunswick Gaslight Co. *v.* Brunswick Village Corp. (Me.), 2 Mun. Corp. Cas. 318, and *foot-note*, 319.

Betham *v.* City of Philadelphia

**Same—Same—Compensation.**—The contention that plaintiff was entitled to recover for such an injury, under the constitutional provision that municipal corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by reason of the construction of public improvements, was without merit, as the defendant city had no authority to build the sluice in question, except in the exercise of its police power.

APPEAL by plaintiff from Philadelphia county common pleas court. *Affirmed.*

*Michael J. Ryan* and *George McGowan*, for appellant.

*Leonard Finletter*, *Jos. W. Catharine*, and *James Alcorn*, *Asst. City Sols.*, and *John L. Kinsey*, *City Sol.*, for appellee.

BROWN, J. The plaintiff below brought suit to recover from the city of Philadelphia for losses sustained by the flooding of lands which he occupied in the lower portion of the city, commonly known as the "Neck." His property was part of a large tract, bounded on the east and south by the Delaware river, and on the west by the Schuylkill, and was from four to six feet below high-tide level. Artificial banks had for many years protected this and other lands in the locality from the overflowing water of the rivers, and sluices and canals formed parts of a system for such protection, and for draining the low-lying ground. On August 1, 1897, one of these sluices blew out, and the land of the plaintiff was overflowed. His crops and other property were destroyed, and, alleging that the loss sustained was due to the city's negligence, he brought this suit against it. The cause was not tried before a jury, but submitted to a referee, under the act of May 14, 1874, whose findings of fact were as follows: "(1) That for many years the lower portion of the city of Philadelphia, comprising that section now embraced within the boundaries of the First, Twenty-Sixth, Thirty-Sixth, and Thirty-Ninth wards, and bounded on the east and south by the Delaware river, and on the west by the Schuylkill river, had been drained into, and protected from overflow from, the said rivers, by a system of sluices

Case Stated.

and canals. (2) That the particular locality in which was situated the farm of the plaintiff was protected from any overflow from the Delaware river by a sluice maintained by the city of Philadelphia, defendant, which for at least eighteen years had worked successfully. (3) That, for public municipal purposes, the city of Philadelphia, the defendant, undertook to, and did, tear out, remove, and destroy said sluice, and undertook to, and did, build the sluice whose improper design and construction are complained of, in its place. (4) That on December 31, 1895, an ordinance was passed by the select and common councils of said city of Philadelphia, defendant, and approved by the mayor thereof, by which an appropriation of twelve thousand three hundred and twenty-eight dollars ($12,328) was made to the bureau of highways of the department of public works, to be expended in the improvement of water ways. (5) That on September 21, 1896, in pursuance of said ordinance, the city of Philadelphia, defendant, entered into a contract, a copy of which is attached to this report, with one John L. Grim, whereby said Grim was to furnish all the materials and perform all the labor required for improving the water ways in the First ward of the city of Philadelphia, in accordance with certain plans and specifications thereto attached. (6) That said plans and specifications were prepared by the bureau of surveys of the department of public works of the said defendant, and that by both contract and specifications, a copy of which is attached to this report, the supervision and control of every part of said work, both as to the mode of construction and the equality of materials to be used, were reserved, from its beginning to its completion, to the city of Philadelphia, the defendant, and that its agents and representatives, its inspectors of the bureau of highways, of the department of public works, did actually undertake its supervision and control. (7) That, in accordance with said authority from said defendant, the said contractor began the work of tearing out the sluice which had existed successfully for at least eighteen years, and the building of a new and differently constructed

sluice. (8) That said work was commenced by him early in October, 1896, and was completed by him early in the year 1897, when it was accepted from him by the city, and the last payment was made to him on June 30, 1897. (9) That the designs and plans furnished by the city of Philadelphia, and upon which the said sluice was constructed, were defective in the following particulars, among others: (a) In providing a too rigid foundation for the sluice box to rest upon, whereby the mud was prevented from making its natural settlement without leaving dangerous spaces under the box; (b) in providing an overhanging ledge at the top of the foundation, thereby preventing the mud from settling in one mass, and thus leaving spaces under the ledge; (c) in want of uniformity in the length of the pilings, rendering the foundations uneven as to settlement. (10) That the said sluice was defectively constructed: First, that the wooden portion of the foundation was defective, the sheet pilings thereof being improperly and negligently driven in such manner as to leave cracks and holes, and splintered edges and tops; second, the mud underneath the sluice box, and upon which it should rest, and into which it should settle, was of inferior, thin, and watery character, and was not puddled or rammed, or made of the texture and consistency required by the specifications. (11) That all of these various defects, both as to the plans and manner of construction, and the defective material and improper use thereof in the building of the sluice, had been repeatedly brought to the notice of the official representatives of the defendant for several months before the sluice blew out. (12) That the sluice so improperly planned and constructed by the city of Philadelphia, defendant, blew out on the 1st day of August, 1897. (13) That at the time of the said blowing out the sluice was, and had been for at least one month, in the absolute control of the defendant, and that it was built under its constant supervision and by its direction. (14) That in consequence of the breaking of the sluice the land of the plaintiff was overflowed, and the

crops and other property of the plaintiff destroyed. (15) That said breaking of the sluice, and the consequent overflowing of the plaintiff's land and the destruction of his crops and other property, was the direct result of the defendant's negligence in planning, constructing, and maintaining an unsafe, improper, and defective sluice or dike. (16) That, after the sluice had passed into the possession and absolute control of the city of Philadelphia, the defendant failed to repair it, although the said city had notice, through its lawful agents, that said sluice was defective and out of repair. (17) That, in consequence of said negligence, Robert Betham has suffered damages to the amount of three thousand five hundred and thirty dollars and sixty cents ($3,530.60)."

In the foregoing findings, it does not appear that the sluice whose blowing out caused the injury complained of by the plaintiff was a part of the sewerage system of Philadelphia, or that it was connected with the same. The plaintiff's contention, however, is, according to his statement filed, that some time before his land was flooded it had become, and continued to be, the duty of the city to construct and maintain the sluice "in a careful and prudent manner, and to make repairs thereto in a skillful and proper manner, so as to maintain a thorough and reasonable system of drainage, in order that damage might not ensue"; and his cause of complaint, as set forth, is that this duty was so negligently and carelessly discharged that the injuries resulted to him, for which the city must make him compensation.

The argument in this case was elaborate, and the discussion of the principles involved took an extended range; but we are persuaded, upon due consideration, that the reasons for our judgment can be briefly stated. No duty had been imposed by statute upon the city of Philadelphia to either protect the land of plaintiff, and the meadow lands of which it formed a part, from the overflow of the river, or to drain the low-lying ground. If such duty had been imposed, and the injuries suffered by plaintiff were due to a neglect to

properly discharge it, the city undoubtedly would be liable. When a legal duty has been imposed by statute upon a municipal corporation, it is undoubtedly liable for injuries resulting from the neglect of that duty. In such case it stands on the same footing in respect to negligence as a purely private corporation or an individual. Erie City *v.* Schwingle, 22 Pa. St. 388; Shear. & R. Neg. 167; Dill. Mun. Corp. §§ 961–965. But the duty imposed must be absolute or imperative,—not such as, under a grant of authority, is intrusted to the judgment and discretion of the municipal authorities; for it is a well-settled doctrine that a municipal corporation is not liable to an action for damages either for the nonexercise of, or for the manner in which, in good faith, it exercises, discretionary powers of a public or legislative character. *Id.* § 949. It is certainly unnecessary to cite further authorities in support of a principle so well settled. Indeed, we do not understand the general doctrine to be denied, but it is argued that it is inapplicable to the case now in hand. McDade *v.* City of Chester, 117 Pa. St. 414, 12 Atl. 421. The city contended before the referee that it was not liable because it was under no duty to construct and maintain the sluice, and, while he did not distinctly find that there was no such duty on its part, he did hold that this reason urged by the city could be assumed to be correct, and that the plaintiff had "not founded his case upon any such claim." We have quoted from the statement in which the claim is so apparently made. We concur with the referee that it can be assumed to be correct that it was not the duty of the city of Philadelphia to construct or maintain the sluice in question, and that no liability had attached from failure to properly discharge an imposed obligation. If there is no liability on the part of the city, due to its failure to properly discharge a duty imposed upon it, is it liable, because, in the language of the referee, "the city of Philadelphia, having undertaken to perform the work of planning, constructing, and maintaining the sluice or dike, was bound to plan and construct it properly, and to maintain it in good condition and repair, and failure to do so renders

the city liable in damages''? If what the city did was done within its corporate authority,—if it had the power to do what it undertook to do,—and in the exercise of that authority, or the execution of that power, it was negligent in the construction or maintenance of the sluice, and injury resulted, it would be liable. Grant *v.* City of Erie, 69 Pa. St. 420; Allentown *v.* Kramer, 73 Pa. St. 406. "The rule of law is a general one that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment, by which another, who is free from contributory fault, is injured. Municipal corporations, under the conditions herein stated, fall within the operation of this rule of law, and are liable, accordingly, to civil actions for damages when the requisite elements of liability co-exist. To create such a liability, it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers, as prescribed by charter or positive enactment. In other words, it must not be *ultra vires*, in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances. If the act complained of necessarily lies wholly outside of the general or special powers of the corporation, as conferred by its charter or by statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act, or whether it be done by its officers without its express command; for a corporation cannot, of course, be impliedly liable to a greater extent than it could make itself by express corporate vote or action. In Cavanagh *v.* City of Boston, 139 Mass. 426, 1 N. E. 834, the plaintiff was the owner of an island and the flats adjacent thereto. It being alleged that certain other flats, in consequence of being left bare at low tide, gave forth an offensive odor, the city council directed a dam to be built across the flats and upon part of the island owned by the plaintiff, by driving pile sheeting into the flats and island, and with gates in the part known

Drains—Negligence—Ultra Vires—Liability of Municipality—Burden of Proof.

as 'Pile Island Channel,' which adjoined said flats. By reason of the omission properly to ballast said dam, the gates were washed away, and the dam was weakened, in consequence of which the property of plaintiff was injured. Verdict was directed for defendant. On appeal, ALLEN, J., said: 'The difficulty with the plaintiff's case is that neither the board of health nor the city government had any authority to abate the nuisance in the manner which was adopted. That manner was by the erection of a dam, the easterly portion of which was built across the flats and upon the upland of the plaintiff, for the purpose of raising the water so as to flow over other flats, away from the flat of the plaintiff; the plaintiff's evidence tending to show that no nuisance existed on their own flats. This was an occupation of the plaintiff's land which the city had no power to make without the plaintiff's consent. * * * When the preservation of the public health has been thought to require such acts as the filling of land or raising its grade over a considerable extent of territory, or the covering of land with water, or the removal of dams from streams, in order to allow better drainage or to prevent the accumulation of offensive materials, it has been usual to pass statutes giving the requisite authority, and making due provision for the protection of the property of individuals. * * * The acts done having been beyond the authority and power of the city to do, the city cannot be held responsible in damages for what was done under the supposed authority of illegal and void votes. * * * The plaintiff seeks to avoid the result by urging that part of the damage came from the negligent construction of the dam, but, since it was illegal to build it at all, it is not apparent how negligence in the trespassers can entail a responsibility on the city.'" Dill. Mun. Corp. (4th Ed.) § 968. Nothing was presented to the referee, and nothing has been brought to our notice, showing that what the city did was done in the exercise of any authority or the execution of any power conferred upon it. On the other hand, by the act of April

12, 1760 (1 Smith's Laws, p. 227), entitled "An act to enable the owners of Greenwich Island to embank and drain the same, to keep the outside banks and dams in good repair, forever, and to raise a fund to defray sundry contingent and yearly expenses accruing thereon," the power was expressly given to the Greenwich Island Meadow Company to do, or to cause to be done, the very thing which the city of Philadelphia undertook to do without any authority, express or implied. The learned referee seems to have concluded that as the defendant had been unable to show "that the legislature at any time or in any manner prohibited the city of Philadelphia, as a municipal corporation," from doing the kind of work which it had undertaken, it had the power to do it. The learned court very properly said, in considering this portion of the report: "But we are of opinion that the defendant was not called upon to show a legislative prohibition, but that the plaintiff was bound to show that the city either—First, had the power granted in express words; or, second, that the power was necessarily implied in or incident to the powers expressly granted; or, third, that they were essential to the declared objects and purposes of the corporation (not simply convenient, but indispensable); and, fourth, that they were powers not exercised under the general police power, but such powers as are exercised by a municipality when acting as a private corporation." The powers given to the Greenwich Island Meadow Company were never expressly repealed, nor can they be considered repealed by implication. The principle of implied repeal is to be applied with great caution. Dill. Mun. Corp. (3d Ed.) §§ 87, 88. It cannot, therefore, be seriously contended that what the city did was done in the exercise of any power conferred upon it, and, not having so acted, no liability attached to it by reason of a negligent exercise of such power.

Though it is manifest that no breach of duty imposed upon the city was proven, and no improper or negligent exercise of power conferred upon it was shown that would

liable to the plaintiff, can it be compelled to render it pay upon any other ground? If there was no failure to perform a plain duty, and if there was no power or authority to construct and maintain the sluice, how did the city act? The proper answer to this question would have saved the learned referee from the error into which he fell. It acted either in the exercise of its police power, or as a mere volunteer, without authority, in relief of the meadow island company. If in the former capacity,—and our judgment is that it did so act,—there is no responsibility for any damages resulting from the improper or negligent exercise of the power. No principle is better settled. Elliott *v.* City of Philadelphia, 75 Pa. St. 347; Boyd *v.* Insurance Patrol, 113 Pa. St. 270, 6 Atl. 536. If, on the other hand, it did not act in the exercise of its police power, the work done was that of a mere volunteer, without authority, and was in relief of the Greenwich Island Meadow Company. The duty to do the work was that of the meadow company, and, if the city did the work in opposition to its wishes, it was done either in the exercise of police power, or, if with the consent of the company, as a mere volunteer. If done as a mere volunteer, no duty arose to the appellant.

Police Power—Negligence—Liability of Municipality.

Lastly, it was contended on behalf of the appellant that he was entitled to recover under section 8, art. 16, of the constitution, which provides that municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed for the construction or enlargement of their works, highways, or improvements; and Butchers' Ice & Coal Co. *v.* City of Philadelphia, 156 Pa. St. 54, 27 Atl. 376, was pressed upon our attention as sustaining this position. But in that case a sewer had been constructed by the city in the exercise of its lawful authority as a municipal corporation. Therein the case differs from the one now before us. Here the city had no authority to build the sluice,

Same—Same—Compensation.

except in the exercise of its police power. The authority to construct, maintain, supervise, and control the banks, dams, sluices, floodgates, drains, etc., had been acquired by the Greenwich Island Meadow Company from the commonwealth, in the exercise of its police power, and the city could not lawfully act in the premises, except in the exercise of a like potent power. Further discussion is deemed unnecessary, and we now affirm the judgment of the court below in overruling the referee, and directing judgment to be entered in favor of the city of Philadelphia. Judgment affirmed.

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## CITY OF LOUISVILLE

*v.*

## O'MALLEY.

(*Court of Appeals of Kentucky, Oct. 28, 1899.*)

**Discharging Sewerage upon Private Property—Liability of City.***—A city is liable for damage to private property caused by its sewerage backing upon the property through its failure to exercise reasonable care to provide another outlet, after its sewer had been stopped up.

**Same—Limitations.**—An action for such an injury to private property is not one of that class to which the five-years statute of limitation of Kentucky applies; and the right of action arises, not at the time of the closing of the sewer, but at the time of the injury caused by the backing of the sewerage upon plaintiff's property.

**Same—Measure of Damages—Instructions.**—In such an action, although the measure of recovery is the diminution in the rental value of the premises by reason of the backing of the sewerage upon it, where the jury were instructed they could allow nothing on account of the sickness of the occupants of the premises or loss of time, such instruction was not prejudicial to defendant in stating that compensation might be allowed for any discomfort, annoyance, and loss of enjoyment of plaintiff's home.

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*See Judd *et al. v.* City of Hartford (Conn.), 3 Mun. Corp. Cas. 46, and *foot-note*; Huffmire *v.* City of Brooklyn (N. Y.), *ante*, 181, and *notes*, 188 *et seq.*

City of Louisville *v.* O'Malley

APPEAL by defendant from Jefferson county law and equity division circuit court. *Affirmed.*

*H. L. Stone*, for appellant.

*Phelps & Thun*, for appellee.

HOBSON, J. Appellee is the owner for life of some houses and lots on High and Twenty-Third streets in Louisville, Ky. A sewer of the city has its outlet near the corner of Twenty-First and High streets. Originally the discharge from the sewer was taken off by a ditch, which emptied into a canal, or by a culvert under a fill made by the Kentucky & Indiana Bridge Company; but both these ways of escape were over the ground of the United States government, and became filled up. By reason of this, the discharge from the sewer was backed up in the rear of appellee's property, and, being augmented by the rain falling on a considerable surface, made a large pond, which spread itself, in time, up to and over a part of her property, soaking the ground, and polluting the atmosphere. To recover for damages for this she filed this suit, and, a jury having found her a verdict for $750, the city prosecutes an appeal.

Case Stated.

It appears that the sewer has been built for many years; that the fill of the Kentucky & Indiana Bridge Company was made in 1889, and that the opening into the canal has been allowed to become stopped up by the United States authorities. On these facts it is urged that the city is not liable, and the five-years statute of limitation is relied on. It is well settled that the city was under obligations to exercise reasonable care in discharging the filth gathered into its sewer, and, when the escape for this filth was stopped up, it was its duty to provide another. It could no more empty this foul matter, by its sewer, on appellee's property, than it could have transported and dumped it there with teams.

Discharging Sewerage upon Private Property —Liability of City.

Appellee was not required to sue until she was injured. This is not one of the class of cases to which the five-years statute of limitation applies. Wood, Nuis. §§ 385, 865. The measure of recovery, as has often been held by this court in cases of this character, is the diminution in the rental value of the premises by reason of the backing up of the filth about them. The court below expressly instructed the jury that the evidence concerning the sickness of appellee's family was only admitted to shed light upon the question of rental value, and of the enjoyment of the property as a home; but there could be no recovery on account of sickness or loss of time in this action. When the jury were told they could allow nothing on account of the sickness of the family or loss of time, we do not think they could have been misled by the instruction allowing them to find compensation for any discomfort, annoyance, and loss of the enjoyment of her home with respect to the property occupied by her. It appeared that she rented out two cottages, and lived in the third house herself; and this instruction, when considered with the others, only warranted the jury in considering the discomfort, annoyance, and loss of the enjoyment of her home in fixing the diminution in the rental value of the house she occupied. It was a legitimate inquiry how much of the fair rental value of this property would be diminished from the discomfort and annoyance by reason of the backing up of the discharge of the sewer. The court only allowed damages for six months before the action was brought, but in several cases this court has held the six-months statute unconstitutional, and damages might have been recovered for five years, if warranted by the proof. But the appellee has prosecuted no cross appeal, and, in view of the verdict on the whole case, we do not see that appellant has any substantial ground of complaint. Judgment affirmed.

Same—Limitations.

Same—Measure of Damages—Instructions.

## PLATT *et al.*

*v.*

## CITY OF WATERBURY.

(*Supreme Court of Errors of Connecticut, Jan. 4, 1900.*)

**Liability for Acts of Board of Sewer Commissioners.**—Where, under a charter provision, the board of sewer commissioners is established to execute certain powers vested in the city, the municipality is responsible for the acts of the commissioners within the scope of their authority.

**Harmless Error.**—Harmless error is not reversible error.

**Riparian Rights—Reasonable Use of River—Question of Fact.**—Whether or not the use of a river by a riparian proprietor is a reasonable use, in view of the rights of other riparian proprietors, depends largely on the circumstances of each case, and is essentially a question of fact.

**Same—Same—Discharging Sewerage.***—The concentration of the filth by one proprietor, whether an individual or a municipal corporation, and its discharge into a river in such quantities that it is necessarily carried to the premises of another, where it produces a nuisance dangerous to his health and destructive to the value of his property, must be an unreasonable use of the river.

**Discharge of Sewerage—Liability of City—Governmental Uses.**†—The mere granting authority to a city to construct, for the convenience and benefit of its inhabitants, sewers adapted to carry off their refuse matter to some neighboring stream, does not necessarily make such use of the sewers a governmental use, so as to exempt the city from liability for damages caused by such use.

**Same—Same—Same—Act of Eminent Domain.**—But even if such use of sewers is strictly a governmental use, a city would be liable, under a constitutional guaranty that "the property of no person shall be taken for public use without just compensation therefor," for concentrating its refuse, and discharging it through sewers into a stream

*See City of Valparaiso *v.* Hagen (Ind.), 3 Mun. Corp. Cas. 51, and *note*, 59; Huffmire *v.* City of Brooklyn (N. Y.), *ante*, 181, and *notes*, 188 *et seq.*

†See Judd *v.* City of Hartford (Conn.), 3 Mun. Corp. Cas. 46, and *foot-note*.

in such quantities that it is necessarily carried to the premises of another, where it produces a nuisance dangerous to his health and destructive to the value of his property; and the fact that the city's charter did not authorize the condemnation of the property so injured would be immaterial in this connection.

**Same—Surface Water Drainage.**—The right of a city to pour into a river surface drainage does not include the right to mix with that drainage noxious substances in such quantities that the river cannot dilute them, nor carry them off without injury to the property of others.

**Same—Same—Effect of Necessity.**—However great may be the necessity for mixing the refuse of a city with its drainage, it can have no effect on the right to compensation for property virtually taken by being diminished in value through the unreasonable use of a iver as the receptacle of the sewerage of a city.

**Same—Injury to Property—Contributory Negligence.**—The contention that plaintiffs contributed to their own injury by not arranging their dam and canal so as to effectually prevent the accumulation of noxious substances brought down by the river was not sustained by the evidence.

**Same—Same—Effect of Plaintiffs' Property Being Connected with Sewer.**—In an action to restrain a city from so using a river and for damages resulting from such use, the fact that plaintiffs had connected property owned by them in the city with the sewer causing the injury, in compliance with the city ordinances, could not prevent them from being entitled to equitable relief, on the ground that they had contributed to their own injury.

**Same—Action to Enjoin—Effect of Contingencies.**—In such an action, although it appears that some steps have been taken by the legislature looking towards the adoption of a plan of sewerage for the whole valley through which the river flows, it is not necessary to incorporate in the order of injunction a provision that it is made subject to the authority of future legislation, or that it should become inoperative if defendant acquired plaintiffs' premises by condemnation.

**Injunction—Judicial Discretion.**—The granting or refusal of an injunction rests in the sound discretion of the trial court.

**Same—Discharging Sewerage—Injury to Property.**—Under the practice act of Connecticut, plaintiffs were entitled to claim damages for the injury done to their property by the unreasonable use of the river as a receptacle of the sewerage of the defendant city, and an injunction against its continuance; and it was no abuse of discretion to compel the defendant city, within a reasonable time limit, to either make compensation for the property virtually taken by such use, or to provide proper means for the disposition of its sewerage.

Platt *v.* City of Waterbury

Evidence.—In such action, testimony to show that plaintiffs' foreman refused to take charge of the premises alleged to be diminished in value by such unreasonable use of the river, because of the stench, was admissible to show that the foreman refused to act on that ground.

Same.—In such action, the testimony of a witness that he had refused to work on such premises on account of the stench was not inadmissible because the refusal was made after the action was brought.

Same.—The act in question provided that it was to take effect when accepted by the defendant city at a special meeting. Defendant offered evidence to show that, at a special meeting of the citizens of the municipality held in pursuance of the act, the city voted not to accept the act. *Held*, that such evidence was not admissible for the purpose of proving the construction of the act.

Same—Harmless Error.—In such action, defendant was not prejudiced by the admission of evidence of a verbal notice to defendant to cease its unreasonable use of the river, as notice to the city was duly proved.

Same.—In such action, the complaint charged that the noxious substances committed to the river by defendant produced certain deleterious effects upon the premises of plaintiffs. *Held*, that it was competent for the plaintiffs, certainly in the absence of objection, to show that such effects were accomplished by the current of the river depositing these substances in the plaintiffs' pond and the canal leading to their manufacturing establishment, and the court did not err in finding that fact.

APPEAL by defendant from New Haven county superior court. *Affirmed.*

Case Stated.

The amended complaint alleges that the plaintiffs are owners of land situate two miles southerly from the city of Waterbury, with manufacturing establishments, dwelling houses, and other buildings thereon, through which land the Naugatuck river flows, upon which and on the plaintiffs' land is a water privilege, from which water is conducted in a canal to the manufacturing establishments of the plaintiffs for the purpose of supplying power; that the plaintiffs are entitled to a natural flow of said river in a pure condition; that from about July 12, 1884, to the present time, the defendant has discharged into the

waters of said river, above the property of the plaintiffs, large quantities of sewage and other noxious substances, which contaminated the waters in the river, and rendered the same noxious and filthy, producing noxious and unhealthy gases, permeating the plaintiffs' said buildings; that, by said action of the defendant, the plaintiffs have been deprived of all use of the water in said river, except for the purpose of furnishing power, and their manufacturing establishments have been injuriously affected by reason of said noxious and unhealthy gases, and the value of their said land, buildings, and water privileges has been largely diminished; that the plaintiffs have duly notified the defendant, and requested it to desist from such defilement of the river, but the defendant has, notwithstanding, continued the nuisance to the present time; that the plaintiffs have already been damaged to the extent of $25,000, and the continuance of said nuisance will still more injure and damage their property. The plaintiffs claim (1) $25,000 damages; (2) an injunction against the continuance of said nuisance. The answer of the defendant admits the plaintiffs' ownership of the property as alleged, and denies all other allegations. It contained, also, a special defense, setting up certain statutes, and action in pursuance of the same, and alleging that the action complained of is the action of the board of sewer commissioners of the city of Waterbury, and not of the defendant. The plaintiffs demurred to this special defense. The court (G. W. WHEELER, Judge) sustained the demurrer, because the statutes referred to show that the board of sewer commissioners was created to act for the city, and had no power except to act for the city, and because the statement of the defense was too inadequate and indefinite to present any other claims. The defendant then by leave of court filed three special defenses, setting up substantially the claims appearing below in the statement of the defendant's claims in the finding of the court. Upon demurrer the court (G. W. WHEELER, Judge) held the defenses insufficient on the ground that the facts which could not be proved under the denials of the answer did not

constitute a defense. The case was then tried on the issues formed by the denials of the plaintiffs' allegations, and judgment rendered that the plaintiffs recover $500 damages, and that the defendant be enjoined against discharging the sewage from its sewers into the Naugatuck river above the premises of the plaintiffs, whereby such sewage shall be carried down the river to said premises, during the months of June, July, August, September, and October in each year, from and after the 1st day of December, 1902. The defendant asked that this injunction be modified so as not to prejudice its rights under possible future legislation in respect to a state sewerage commission, and also to include a provision that the injunction should become inoperative whenever the defendant might acquire the plaintiffs' property by condemnation. The modification was denied, as unnecessary.

The court (SHUMWAY, Judge) made the following findings:

"(1) At the the time of the institution of the suit, and for many years before, the plaintiffs, as admitted in the answer to the first paragraph of the complaint, were the owners of the tract of land situated in the town of Waterbury, about two miles southerly from the city of Waterbury, with manufacturing establishments, dwelling houses, and other buildings thereon, through which said land flowed the Naugatuck river. On the said lands of the plaintiffs there was a valuable water privilege, from which water was conducted in an artificial canal to the several manufacturing establishments of the plaintiffs for the purpose of supplying water therein.

"(2) Under an amendment to the charter of the city of Waterbury (9 Sp. Laws, pp. 233–237), and in accordance with the provisions thereof, the city of Waterbury, by the board of sewer commissioners, began the construction of sewers in said city in 1883, according to a sewerage system by which the contents of the sewers were all discharged

into the Naugatuck river at points about two miles above the manufacturing establishments of the plaintiffs.

"(3) The place where said manufacturing establishments were carried on always has been, and is now, known as 'Platt's Mills.' At that place there has been a mill site for about a hundred years, at least; the dam across the Naugatuck river being at the same place, and substantially of the same height, as it was in 1811. It was raised one foot about twenty-five years ago. From a pond made by the dam the water has always been taken out by means of an artificial canal, the property of the plaintiffs, which carried it down to the said manufacturing establishments, a distance of about half a mile. About $150,000, in all, has been invested in the plaintiffs' manufacturing establishments at Platt's Mills.

"(4) Prior to the construction of said sewers in accordance with the said sewerage system by the city of Waterbury, the waters of the Naugatuck river at Platt's Mills had contained no substances in sufficient quantity to be annoying to the plaintiffs, or injurious to their business or property.

"(5) The defendant commenced to discharge into the Naugatuck river the sewage from said sewers about July, 1884, but it was several years before the plaintiffs experienced any special difficulty therefrom.

"(6) No attempt had or ever has been made by the city of Waterbury to agree with the plaintiffs as to any compensation to be paid them for any injury to any 'estate, property, right, privilege, or franchise' which might be incurred by them by said use of the Naugatuck river for the discharge therein of the contents of said sewers, nor has any such compensation been made.

"(7) For a considerable period prior to the institution of this suit the plaintiffs were very much and specially annoyed and injured, as hereafter stated, in the use and enjoyment of their property, by reason of the sewage discharged from said sewers into the Naugatuck river. It also appeared in evidence that there were other sources of pollution by which the water of the said river was also affected.

"(8) In the early part of the year 1891, and before this suit was brought, the plaintiffs requested said city, both through its board of sewer commissioners, whose authority is described in said amendment to the charter of the city of Waterbury hereinbefore referred to, and through its court of common council, to desist from continuing to discharge the contents of such sewers into the Naugatuck river; or, if the city should persist in so doing, that the city should take steps under said amendment to assess damages and compensation to the plaintiffs for any injury to their estate, property, right, privilege, or franchise which might or would be incurred by the use of Naugatuck river as an outlet for the discharge of said sewers. Said city of Waterbury neglected to comply with said request in either particular, and has taken no steps to prevent the pollution of the waters of Naugatuck river by the sewage discharged into it from said sewers, or to assess such damages.

"(9) In 1854 the population of the city of Waterbury was about 10,000. It was agreed on the trial that its present population is about 42,500. Of late years the population has rapidly increased.

"(10) There are about 32 miles of highways in said city, which it is the duty of said city to maintain in a condition safe and convenient for public travel. For this purpose these highways are drained into the sewers of said city by means of gutters and catch-basins, and thereby a quantity of filth from the streets finds its way into the Naugatuck river, and a further quantity of surface water flows over said highways into Great brook and Little brook, and this is carried into said Naugatuck river.

"(11) The contents of the discharges of said sewers have been, and are, the same as are continually discharged from city sewers containing organic matter capable of decomposition and putrefaction, and, if not further diluted or purified, will putrefy.

"(12) The sewage system of the city of Waterbury has continually been extended since 1884, and is now being

extended as the growth and wants of the city require. The number of sewer connections in January, 1885, was 359; on the 1st of January, 1893, 1,748; on the 1st of January, 1898, 3,046,—extending through about 31 miles of streets. These connections are with manufactories,—some employing 2,000 operatives,—stores, hotels, dwelling houses, etc.

"(13) In consequence of the discharge of the contents of these sewers into the Naugatuck river, the waters of the river in the season of the year when the water was or is low were for a considerable period prior to the commencement of this suit, have been, and are inadequate to properly dilute the sewage, so that the pollution of the waters of the river from such sewage from said city of Waterbury had before the bringing of this suit passed, and ever since has passed, the limits of safe tolerance.

"(14) The accepted rule of safe tolerance is one part of sewage to twenty parts of pure river water. It is found that during the months of July, August, September, and October of the years 1894, 1895, 1896, and 1897 the average ratio of sewage in the waters of Naugatuck river a short distance below Platt's Mills to pure river water has been substantially one part of sewage to about eleven parts of pure river water; and during the months of August and September during said period the average ratio of sewage to pure river water in the waters of Naugatuck river at the same place below Platt's Mills has been on the basis of one part of sewage to about eight parts of river water.

"(15) The flow of water in the Naugatuck river in the dry season of the year varies greatly in different years. The rainfall at Waterbury for a period of years between 1887 and 1897, inclusive, is shown by a table kept by Nelson J. Welton, president of the board of water commissioners for the city of Waterbury for many years, and a civil engineer, which table was offered in evidence by the defendants, and marked 'Exhibit 1.' While the rainfall of a watershed may not be the most reliable means of ascertaining the volume of

water in a river receiving the rainfall of such watershed, yet the varying amounts of the rainfall in different seasons do represent with approximate accuracy the comparative flow of the river, measuring one season with another; and the table of Mr. Welton shows how the flow of water in the Naugatuck river has varied between 1887 and 1897.

"(16) For a considerable period of time before the commencement of this suit, and to an increasing amount ever since, the sewage from said sewers of the city of Waterbury has been carried down the Naugatuck river, has settled in the waters of the pond made by the plaintiffs' dam, and in the said canal leading from the dam to the manufacturing establishments; and in the warm seasons of the years it has putrefied, causing large and numerous patches of foul and offensive stuff to come to the surface of the pond and canal, giving forth offensive odors, and fouling the water to such an extent as that the hands of the plaintiffs' operatives, after being in the water for any purpose, would carry away an offensive smell. The deposits from such sewage during all said period both before and since the suit, at the bottom of the pond and in the canal, have been deep, and have been a great annoyance to the plaintiffs in repairing their dam, in clearing out their canal, especially at its head, and in repairing their wheel pit. The odors from this putrefying sewage in the warm and low-water seasons of the years, both before and since the institution of the suit, have been so strong and offensive as to compel the shutting of the windows of the plaintiffs' manufactories, and to make some of the plaintiffs' operatives sick with nausea and consequent vomiting, and all uncomfortable; and said odors are likely to cause serious and protracted sickness. Some of the plaintiffs' operatives have been unwilling to work at Platt's Mills, by reason of the objections made by them to the conditions just described; and, by reason of said conditions, plaintiffs have not been able to improve a very large portion of their water power at Platt's Mills, or to improve a large portion of a

manufacturing building erected there since the suit, to take place of one damaged by fire.

"(17) In the conduct of the plaintiffs' business at Platt's Mills, a large quantity of pure water for dipping and cleansing their manufactured products is essential. Prior to the introduction of the sewerage system of the city of Waterbury, the plaintiffs had been able to use the waters of the Naugatuck river for that purpose. Since said date, both before and after the institution of the suit, the waters of the river have become so foul that they cannot be used for the purpose; and the plaintiffs are compelled to take this part of their manufactured product to a branch of their works in the city of Waterbury for the purpose of dipping and cleansing, and return the same to Platt's Mills for finishing.

"(18) The plaintiffs have used two different devices for carrying off the accumulation upon the surface of the water: A log or beam was placed at the entrance of the canal, so inclined as to throw the floating substances away from the canal towards the dam. They also constructed in the canal, near the raceway, a box sunk in the water, with an outlet in the bottom. When the canal was full of water, it would flow over the sides of the box, and carry into the box the floating material, and this was conducted in an underground drain into the river. It did not appear from the evidence that any other means could reasonably be adopted, and preserve the full efficiency of the water power.

"(19) The noxious and offensive odors created by said sewage in the manner above stated, and the pollution of the waters of the river by said sewage, are likely to increase with the growth and development of business and population in the city of Waterbury; and, unless such conditions are restrained and prevented, the value of the plaintiffs' said premises at Platt's Mills will be diminished, if not substantially destroyed.

"(20) In the year 1868, and from time to time down to the year 1895, by authority of its charter and amendments thereto, the city of Waterbury procured water supplies from

certain streams which are tributaries of the Naugatuck river. Some of these streams flow into the Naugatuck river within the limits of the city, and some without. Two other streams, known as 'Great Brook' and 'Little Brook,' flow through and near the center of the city into said river.

"(21) This water supply has been used by the inhabitants of said city in their residences, stores, offices, factories, hotels, restaurants, and for public buildings, and for flushing gutters and watering streets, and for all the various purposes for which city water is ordinarily used, and after so being used has been discharged mostly into the said sewers, and to a limited extent into the natural streams within the city, and thus has found its way into Naugatuck river. The quantity of water so used is about four million gallons per day.

"(22) The sewers were constructed under the advice of a skillful and competent sanitary engineer, and of skillful and competent civil engineers. The sanitary engineer was Rudolph Herring. He advised the city of Waterbury, in writing, through its board of sewer commissioners and through the court of common council, when the sewerage system of said city was first established, in 1883, that the time would come when the waters of the Naugatuck river would no longer be able to properly dilute the sewerage from the sewers, and that when such time should arrive it would be necessary for the city of Waterbury to take steps to remove the sewage out of the river, or to take some other proper measure by which the waters of the river would not be polluted beyond the point of safe tolerance.

"(23) The plaintiffs, so far as appears, took no part, one way or the other, concerning the institution of the sewerage system of the city of Waterbury. The officers and directors of the plaintiff company are residents of Waterbury. For more than twenty years they have also owned and occupied a factory located on Great brook, in the city of Waterbury, in which they now employ from 150 to 200 hands. Before the introduction of said sewerage system the refuse from such factory, including the water from water-closets and

urinals therein, went into Great brook, directly or indirectly, and thence into the Naugatuck river. Within a year or two after said introduction of said sewerage system, and as soon as the sewer was built in the street on which was the city factory, the plaintiffs, in compliance with the ordinances of the city, connected their city manufactory with the sewer, and thereafter no foul water of any kind left said factory except through said sewer.

"(24) Upon trial of the case the following question of evidence arose: Lewis A. Platt, the manager of the plaintiffs, in his testimony testified that, after the burning of a rolling mill at Platt's Mills, the plaintiffs were obliged to have a rolling mill at once, and there was no place on the property in the city to put it; and he testified as follows: 'And afterwards we put up a building about 150 feet long by 50 feet wide, with the intention of moving various departments from the city mills to Platt's Mills. We did move one department there at first, with some difficulty. Q. What do you mean by "some difficulty"? A. Well, I mean there was some objection on the part of the people who had charge of it,—the foreman. Q. That is, he worked in that department here in the city? A. Yes. Q. You say some objection. What objection? (Objected to as being hearsay statements.) Court: What he said, you don't care for. Q. There was some objection on their part. I want to know what the objection consisted of, not what they said,—whether it was because of the going out of the city, or what the objection was, or whether it was attributable to this nuisance. That is all. Mr. Harrison: What the gentleman seeks is, apparently, to avoid the rule against hearsay. Then he cannot tell what the party said, but he is going to ask him to tell your honor the substance of what they said. There isn't any difference in the principle. Mr. Alling: Sometimes the very hearsay is admissible. The objection a person gives to doing a certain thing is that he said so and so. If he said so, it doesn't prove that the thing exists, but it shows the objection. It isn't hearsay in the objectionable sense. It is

the very thing we want,—what reason did he assign, if any, for not going? It isn't offered to prove that there was a stench down there, but it is offered to prove that the foreman wouldn't take charge because of the stench, and that he set up that as a reason. This evidence is in no sense evidence as to condition of the stench. It is evidence as to the reason,—the difficulties that he assigned, and the reasons which other people assigned, for not going to work; the difficulty of establishing a branch of industry where the stench is so severe that the men refuse to go there. Mr. Harrison: If it was a controversy between this company and the men themselves over some issue or other, and this was a material fact, then what the men said would be admissible, because they would be parties. These men are not parties to these proceedings. This evidence is introduced for the purpose of asking your honor to find damages for them in a large amount, and your honor is asked to find and hear what some men said about the stench there, as a reason. Mr. Terry: No, no. Mr. Harrison: The substance of what they said,—the objection they made to going there is necessarily the substance of what they said on the subject. The proper way to prove that is to call the men themselves, and see what they have to say about it, not what they said to this employer; *non constat* but what they said something else. Perhaps they were trying to push up their wages. Mr. O'Neill: There is another objection. This objection on the part of the man going down there was all after this controversy arose. These new mills were set up here within the last two or three years, and it would be very easy for a person to make out a case,—for a person to make evidence for himself. Mr. Alling: All that is simply to the weight of the testimony. If he can't get workmen to go there on account of the stench, he can't carry on his work, and that depreciates the value of his property. The Court: I am inclined to think you are entitled to that fact, if it is a fact, that you can't get workmen to go there on account of the stench. Mr. O'Neill: It doesn't give us any opportunity to cross-examine the man who made the state-

ment. The Court: I think I will allow the witness to answer the question. Mr. Harrison: I think this fact ought to appear in the record, as to the time when this took place, so that it may appear whether it was after this suit was brought. Mr. Terry: Yes; it was after the suit was brought. But that don't affect the question whether it has injured our property, and prevented us from developing,—whether it has occurred before or after. (Exception by the defense.) Q. You say some objection. What objection? A. The foreman was afraid his health would be injured, and he anticipated difficulty in keeping his workmen together. Q. Well, for what reason? A. On account of the sewage in the river. Q. Whether or not, in fact, you have been prevented by that cause from increasing your plant down there by filling up the unoccupied portion, which you testified to yesterday, of this new factory which you have built? A. Yes; I have attempted to move three departments to that building, and I have met with the same objection. Q. So, if I understand you correctly, substantially half of this new building remains unused at the present time? A. Just about half.' Afterwards the plaintiffs introduced sundry operatives of the plaintiffs in their city factory, who testified that they objected to go down to Platt's Mills to work on account of the offensive nuisance there.

"(25) Franklin G. Newbert was called as a witness by the plaintiffs, and testified he was in the employ of the Platt Bros. Company, and had charge of the short-eyelet department. The following question was asked on the direct examination: 'Q. Whether or not Mr. Platt has been to you with reference to moving your department or works down to Platt's Mills? A. Yes; he did. Q. Whether you made any objection to going down, to Mr. Platt? A. I did object. Q. For what reason? A. Because of the smell down there,—in regard to my health.' It appeared that this was since the bringing of this action, and that the witness had not left the Waterbury factory. The defendant objected to this evidence because it appeared that the witness had not made any objection to

going to Platt's Mills until after this action was brought. To the ruling of the court admitting the question, the defendant excepted.

"(26) In March, 1877, the general assembly passed an act concerning the city of Waterbury (8 Sp. Laws, pp. 121–126), which is hereby made part hereof. By section 11 of said act, it was to take effect when accepted by said city at a special meeting to be duly warned and held for that purpose. The defendant offered to show that, at a special meeting of the citizens of Waterbury held in pursuance of said act, the city voted not to accept the act. The court excluded the evidence, and the defendant duly excepted.

"(27) On the trial of the case the defendant offered to show, from the records of the board of sewer commissioners of the city of Waterbury, the warning of the first meeting of the board of sewer commissioners, for the purpose of organization, signed by the mayor of the city April 17, 1882, for the purpose of showing that the board was organized under the act of 1881, and proceeded to employ engineers, to adopt a plan, and to construct these sewers, acting independently, under authority of the act of 1881. Upon this offer the court said: 'Is it for the purpose of showing that they were compelled to build the sewer? Mr. Burpee: Yes. The Court: It is ruled out. Mr. Burpee: There are a number of other records for that same purpose. I think this is sufficient for that point.' The defendant duly excepted to said ruling.

"(28) The court found the damages to the plaintiffs to the commencement of the suit to be $500, and rendered judgment for that amount and costs, together with an order and injunction, as on file.

"(29) On the trial of the case the plaintiffs claimed that the defendant was bound to take its sewage out of the river, so as to prevent its becoming a nuisance to the plaintiffs' property, or to assess and pay the plaintiffs their damages under the said act of 1881.

"(30) The defendant offered testimony from which I find that the expense to the city of Waterbury in removing said

sewage from the Naugatuck river, or of preventing the unreasonable pollution of its waters by reason of such sewage, will be very great, and that such work will take considerable time, and asked that, if an order of injunction was issued, that it be so drawn as not to take effect immediately, nor within a period of three years from date. It is found that a reasonable period for the defendant to remove said sewage from the river, or to otherwise prevent the waters of the river from being unreasonably polluted, would be the 1st of December, 1902.

"(31) The defendant now further objecting that the injunction order should not be so drawn as to prevent the use of the waters of said Naugatuck river for said sewage during the seasons of the year when the flow of the river is full and sufficient for the safe dilution of the said sewage, it is found upon the evidence that such use of said river at the present time is safe, and not injurious to the plaintiffs, during the months of the year, except June, July, August, September, and October, and for those months it is unsafe and injurious to the plaintiffs, as heretofore stated and described.

"(32) The plaintiffs' attorney, to prove the allegations of the fifth paragraph of the complaint, offered to show that he had at one time given verbal notice to the sewer commissioners of the city of Waterbury that they should cease to pollute the waters of the Naugatuck river. The defendant objected on the ground that nothing in the charter of the defendant city authorized the board of sewer commissioners to stop sewering into the Naugatuck river, or to do anything else with the sewage except to empty it into such river, and they were not the agents of the city to receive protests or notices, or for any other purpose, except to manage the sewer system of the city in the manner prescribed by the charter of the city. The court admitted the evidence, and the defendant duly excepted to the ruling.

"(33) The defendant claimed (a) that the construction of said sewers was a public, governmental work; (b) that the use of said sewers was a public, governmental use; (c) that the use

of said sewers as above described was a reasonable use thereof; (d) that the defendant had the legal right to use its water supply for the purposes and in the manner above described; (e) that the use of said water supply in the manner and for the purposes above described was a reasonable use thereof; (f) that inasmuch as the plaintiffs themselves had been for a long time, and were still, contributing to the pollution of the Naugatuck river in the same manner as other inhabitants of the city, they were not entitled to either damages or relief by injunction; (g) that the plaintiff, by obstructing the free flow of the water in the Naugatuck river by its dam as above described, caused or contributed to its own injuries, and that it was not, therefore, entitled to any damages, or to injunctive relief; (h) that the injuries complained of and found to exist were and are not direct, but consequential merely; (i) that the charter of the defendant and its amendments do not provide for compensation for merely consequential injuries resulting from the construction or use of said sewers; (j) that the injuries to the plaintiffs are not so great as to require the expenditure by the defendant of $1,000,000 or more for relief from plaintiffs' present injuries; (k) that the plaintiffs are not entitled to damages and to injunctive relief also; (l) that the defendant is not liable for consequential injuries resulting from construction of its sewers, or the reasonable use thereof; (m) that the construction and maintenance of said sewers by the defendant were authorized by express legislative authority, and that therefore the plaintiff was not entitled to injunctive relief; (n) that, if the plaintiff was entitled to injunctive relief, it is entitled to have the defendant restrained only until the plaintiffs' damages have been ascertained and paid; (o) that inasmuch as no evidence has shown that the water in the Naugatuck river was contaminated to a noxious or offensive degree at any time except during the months of July, August, and September in each year, the defendant ought not to be enjoined from the use of the river except during those months. The attention of the court was not called to the claim numbered 'o' until judg-

ment had been rendered in the case. The plaintiffs having requested a modification of the judgment and injunction, if the defendant also request it the judgment may be modified to conform to the following draft annexed to this finding."

The appeal assigns for error the action of the court (1) in respect to certain preliminary motions and the demurrers; (2) in the rulings on the admission of testimony as stated in the finding; (3) in overruling the defendant's claims set forth in parapraph 33 of the finding; (4) in finding the fact stated in paragraph 16 of the finding,—that sewage from said sewers had settled in the waters of the pond made by the plaintiffs' dam and the canal leading therefrom, because there is no allegation in the complaint to that effect, and no such issue of fact is raised by the pleadings.

*Lynde Harrison*, *John O'Neill*, *Lucien F. Burpee*, and *John P. Kellogg*, for appellant.

*John W. Alling* and *George E. Terry*, for appellees.

HAMERSLEY, J. (after stating the facts). There is no error in the disposition of the preliminary motions.

The demurrer to the special defense was properly sustained. Under the charter of the city of Waterbury, the board of sewer commissioners is established to execute certain powers vested in the city, and the municipal corporation is responsible for the acts of the commissioners within the scope of their authority. The action complained of in the complaint was the action of the city. Town of West Hartford *v.* Board of Water Com'rs of City of Hartford, 44 Conn. 360, 369.

Liability for Acts of Board of Sewer Commissioners.

Harmless Error.

Sustaining the demurrer to the three special defenses subsequently filed is not ground for a new trial. These defenses contained certain allegations of facts that may be admissible under the issues formed by the denials of the several paragraphs of the complaint. Possibly some of these allegations might have been retained in the answer as explaining the nature of the denials, but, if so, the

defendant has not been injured. It has gone to trial on the denial of the facts stated in the complaint, and it has had the benefit of all evidence that it could have introduced under the special defenses. All claims of law arising on these defenses are also fully presented in the record by the action of the court in overruling the claims of the defendant as to the legal effect of the facts found, and will be considered in disposing of those claims.

The court did not err in overruling the defendant's claims set forth in paragraph 33 of the finding. To understand the precise nature of the questions of law involved, it is convenient to briefly restate the material facts. The plaintiffs owned an ancient water privilege on the Naugatuck river, below the defendant city, and also the land on the river, and large manufacturing establishments run by the water power. The river drains a section somewhat thickly populated, and largely used for manufacturing. By this use of the river, reaching back to the early settlement of the Naugatuck valley, its water prior to 1884 had become polluted to a considerable extent, rendering it unfit for the primary use of water. About 1884 the defendant constructed, under authority from the legislature, certain main and lateral sewers, by means of which filthy and noxious substances accumulated by inhabitants of the city were collected and discharged into the river in such quantities that the water was inadequate to dilute such sewage, and the same was carried to the premises of the plaintiffs, producing the injuries complained of. Before the construction of the sewers the pollution of the river was not of such a nature as to produce such injuries.

Riparian Rights—Reasonable Use of River—Question of Fact.

The defendant claims that its use of the river is a reasonable use, and is justified by the fact that the water of the river has been for an indefinite period given up to secondary uses. This claim is substantially disposed of by the court as a question of fact. Whether or not the use of a river by a riparian proprietor is a reasonable use, in view of the rights of other riparian pro-

Riparian Rights—Reasonable Use of River—Question of Fact.

prietors, depends largely on the circumstances of each case, and is essentially a question of fact. Keeney & Wood Mfg. Co. *v.* Union Mfg. Co., 39 Conn. 576, 581. The inference of the trial court, from the special facts found, that the city's use of the river is an unreasonable one, is the only inference that can legally be drawn from those facts. The use of a stream for drainage may under some circumstances be reasonable, although the water is thereby rendered unfit for its primary use; but the concentration of the filth accumulated by one proprietor, whether an individual or a municipal corporation, and its discharge into the river in such quantities that it is necessarily carried to the premises of another, where it produces a nuisance dangerous to his health and destructive of the value of his property, must be unreasonable. Morgan *v.* City of Danbury, 67 Conn. 484, 493, 35 Atl. 499. If the defendant has, as claimed, a prescriptive right to pollute the river in the manner used prior to 1884, that right does not justify it in further polluting the river by an additional and different use; and the defendant cannot acquire by any prescription a right to maintain a nuisance like that described in the finding. Nolan *v.* City of New Britain, 69 Conn. 668, 683, 38 Atl. 703. Its defense therefore must rest wholly on legislative authority.

Same—Same—Discharging Sewerage.

The main contention of the defendant may be stated in this way: The use of the sewers under authority of the legislature in the manner described is a public, governmental use. The injuries to the plaintiffs result from this governmental use, and are not direct, but merely consequential. The victim of consequential injuries resulting from a governmental use is entitled to no remedy unless one is given by statute. The defendant's charter does not provide for consequential injuries resulting from the use of said sewers. *Ergo* the plaintiffs have no remedy, and their damage is *damnum absque injuria*. The premises essential to this conclusion are untrue. A governmental use may include any act which the state may lawfully

perform or authorize. There are, however, governmental acts to which certain immunities attach, and it is with this restricted meaning that the phrase is used by the defendant. In this sense a governmental act is one done in pursuance of some duty imposed by the state on a person, individual or corporate, which duty is one pertaining to the administration of government, and is imposed as an absolute obligation on a person who receives no profit or advantage peculiar to himself from its execution. It is the state exercising its governmental power through an agent, who in this matter is the agent of the state, and nothing more. It is to be distinguished from a large class of governmental acts which the state, by way of grant or special privilege, authorizes persons to perform in part for their personal benefit. The principal immunities belonging to a governmental act, in this restricted sense, are: (1) Freedom from personal responsibility for the consequences of the act done. So long as a lawful mandate of the state is faithfully executed, the agent acting within the scope of that authority enjoys the exemption from suit which belongs to the state. (2) Freedom from personal responsibility for the negligence of his servants. The rule of *respondeat superior* does not apply, because the agent of the state is not the superior. The real superior is the state itself. The defendant claims these immunities. It may be doubted whether the use of sewers under the charter of the defendant for the collection and disposition of refuse belonging to its citizens is a governmental act, within the definition given. The charter authorized the construction of sewers for that purpose, but no absolute duty was imposed upon the city. Action in pursuance of the authority was at its option, and could not have been enforced by any process of law without further legislation. While sewers or drains for the disposition of surface waters collecting in highways may be considered as mere adjuncts of a highway, partaking of its nature as a governmental use (Cone *v.* City of Hartford, 28 Conn. 363, 372), it is different with sewers for the disposition of refuse and filth accumulated

on private property. The disposition of such stuff is in part for the benefit of the property holder. The city represents in such respects the interests of its inhabitants, and is granted certain special powers, in part for the promotion of their interests. Bronson *v.* Borough of Wallingford, 54 Conn. 513, 519, 9 Atl. 393. It is well settled that there is a clear distinction between those governmental duties imposed upon a city as a mere agent of government, and those governmental powers granted as a privilege primarily for the personal benefit of its inhabitants. But the tests for the demarkation of the two classes of power are not so well settled. When the terms of the statute are clear, they furnish the most reliable test; and some weight, perhaps, may be given to the nature of the power as commonly regarded (Jewett *v.* City of New Haven, 38 Conn. 368, 377, 379, 387, 389; Jones *v.* City of New Haven, 34 Conn. 1, 11, 13, 14), care being taken not to clothe an individual with the immunity of the state beyond the necessity of his agency. The distinction must always be in some cases a difficult one to draw. We think it evident that the mere granting authority to a city to construct, for the convenience and benefit of its inhabitants, sewers adapted to carry off their refuse matter to some neighboring stream, does not necessarily make such use of the sewers a governmental use, in the sense indicated. On the other hand, it is also evident that the legislature may impose the duty of constructing sewers in such manner as to make the performance of that duty strictly a governmental act. But if, for the purpose of this case, we concede the defendant's claim that the use is a governmental use, it is nevertheless liable to the plaintiffs. The injury described by the complaint is not a mere consequential damage, like that resulting wholly from the lawful use of one's own property or the lawful exercise of governmental power. It is a direct appropriation of well-recognized property rights within the guaranty of the constitution. "The property of no person shall be taken for

Discharge of Sewerage—Liability of City—Governmental Uses.

Same—Same—Same—Act of Eminent Domain.

public use without just compensation therefor." Nolan *v.* City of New Britain, 69 Conn. 681, 38 Atl. 707. And so the defendant's claim that its charter does not authorize the condemnation of the plaintiffs' property rights is immaterial. Upon a careful examination of the charter as enacted in 1871 (7 Sp. Acts, p. 206), and amended in 1881 (9 Sp. Acts, p. 233 *et seq.*), in 1883 (*Id.* p. 839), and in 1884 (*Id.* p. 954), and applying the rule which requires a law to be so construed, if reasonably possible, as to give it validity, we think the city is authorized to make compensation, by agreement, or after appraisal, for any private property taken for the purpose of the maintenance and use of the sewers authorized. But, if it were otherwise, the defendant would not be benefited. Its whole defense of acting under lawful state authority would then fail, and the mere finding of the facts alleged in the complaint would clearly support the judgment.

The defendant's brief presents its claim in a form somewhat different from that stated in the finding, and certainly novel in this state. It is substantially this: (1) A riparian city has a right to use the river for surface drainage, and such surface drainage necessarily pollutes the water to some extent, increasing with the growth of the city. (2) The use of these legitimate drains to carry off the noxious refuse accumulated by its inhabitants becomes in time an absolute necessity. (3) The right of surface drainage is thereby enlarged so as to include the right to discharge into the river, by means of these drains, such noxious refuse. Therefore the necessities of municipal growth give to the city a right to convey these noxious substances to the property of downstream proprietors, and so to appropriate that property for public use without compensation. It is unnecessary now to discuss the limitations to the right of surface drainage, for the second and third propositions are clearly wrong. The right to pour into the river surface drainage does not include the right to mix with that drainage noxious substances in such quantities that the river cannot dilute them, nor safely

Same—Surface Water Drainage.

carry them off without injury to the property of others. The latter act is in effect an appropriation of the bed of the river as an open sewer, and the proposition that it may become lawful by reason of necessity is inconsistent with undoubted axioms of jurisprudence. The appropriation of the river to carry such substances to the property of another is an invasion of his right of property. When done for a private purpose, it is an unjustifiable wrong. When done for a public purpose, it may become justifiable, but only upon payment of compensation for the property thus taken. Public necessity may justify the taking, but cannot justify the taking without compensation. It may be necessary for a city to thus mix with its drainage such substances, but it is not necessary to pour such mixture into the river without purification. Indeed, the purification is coming to be recognized as a necessity. But, however great the necessity may be, it can have no effect on the right to compensation for property taken. The mandate of the constitution is intended to express a universally accepted principle of justice, and should receive a construction in accordance with that principle, broad enough to enable the court to protect every person in the rights of property thus secured by fundamental law. There are certain apparent, but not real, exceptions to this protection. Emergencies may be such as to justify the taking of property without waiting to provide for compensation. Property may be destroyed without compensation in certain cases, when used unlawfully, or when it has become a thing of danger. But this is not a case of war or conflagration. The plaintiffs have not so used their property as to subject it to the harsh police power of confiscation. The plaintiffs have certain rights as riparian landowners. These rights are property, within the meaning of our constitutional guaranty, and an invasion of these rights such as the defendant has made is a taking of that property. The legislature has no power to authorize such taking, except for public use, and then only upon providing for just

Same—Same—Effect of Necessity.

compensation. Kellogg *v.* City of New Britain, 62 Conn. 232, 239, 24 Atl. 996; Wadsworth *v.* Tillotson, 15 Conn. 366, 373; Harding *v.* Water Co., 41 Conn. 87, 93; Nolan *v.* City of New Britain, 69 Conn. 668, 681, 38 Atl. 703; Fisk *v.* City of Hartford, 70 Conn. 720, 731, 40 Atl. 906; Seifert *v.* City of Brooklyn, 101 N. Y. 136, 4 N. E. 321; Chapman *v.* City of Rochester, 110 N. Y. 273, 277, 18 N. E. 88. In England the protection of property from appropriation for public use without compensation does not depend on any fundamental law, but upon inherent justice, and the principle is carefully recognized in all legislation authorizing an infringement of private rights. So the legislative authority for emptying the sewerage of cities into water courses and rivers is coupled with the provision that no nuisance is thereby authorized. Such legislation protects private rights in a manner similar to our constitutional legislation. The city of Leeds, having obtained an act of parliament for emptying its sewerage into the river Aire, claimed that the usual protection was not included in the act, and therefore the city was not responsible for nuisances maintained under an act of parliament, urging the same plea of necessity pressed in this case. JAMES, V. C., held that the act would not bear the construction claimed, and said he would be bound to put any construction on the act "which would prevent such a monstrous injustice." This decision was affirmed by the appellate court, GIFFORD, L. J., saying, "In construing the act one must always consider that, if it had a different meaning, it would be against common sense." Attorney General *v.* Leeds Corp., 5 Ch. App. 583, 588, 596. The theory of the defendant that the necessities of a city may not only justify the taking of riparian rights, but the taking without compensation, seems to find support in some Indiana cases. City of Richmond *v.* Test, 18 Ind. App. 482, 48 N. E. 610; Barnard *v.* Sherley, 135 Ind. 547, 34 N. E. 600, and 35 N. E. 117; City of Valparaiso *v.* Hagen (Ind. Sup.; recent case, not yet officially reported), 54 N. E. 1062. We do not find other cases that take this extreme ground. The right to compensation cannot be questioned in this state.

Platt *v.* City of Waterbury

The defendant claims that the plaintiffs are not entitled to equitable relief, because they contributed to their own injury: (1) By not arranging their dam and canal so as to effectually prevent the accumulation of noxious substances brought down by the river; (2) by using the sewers in the same manner as other inhabitants of the city. The court finds that devices were used by the plaintiffs to mitigate the evil, and that "it did not appear from the evidence that any other means could reasonably be adopted, and preserve the full efficiency of the water power," and also finds that the plaintiffs owned property in Waterbury which prior to 1884 drained into the Naugatuck river, and that after that date, in compliance with the city ordinances, the plaintiffs connected this property with the sewer. These facts fall far short of proving that the nuisance complained of was due in part to the fault of the plaintiffs, so that they do not come into court with clean hands.

Same—Injury to Property—Contributory Negligence.

Same—Same—Effect of Plaintiffs' Property Being Connected with Sewer.

It appears that some steps have been taken by the legislature looking towards the adoption of a plan of sewerage for the whole Naugatuck valley. The present rights of the plaintiffs are not contingent on the future action of the legislature, and there is no public policy which forbids the issue of an injunction to protect their rights because of such possible legislative action. It was plainly unnecessary to incorporate in the order of injunction a provision that it is made subject to the authority of future legislation, or that it should become inoperative if the defendant should hereafter acquire the plaintiffs' premises by condemnation.

Same—Action to Enjoin—Effect of Contingencies.

The claim is made that the court abused its discretion in granting an injunction, under all the circumstances of the case. "The granting or refusal of an injunction rests in the sound discretion of the court, exercised according to the recognized principles of equity." Fisk *v.* City of Hartford, 70 Conn. 732, 40 Atl. 910. We think the trial court has acted within the limits of

Injunction—Judicial Discretion.

this discretion. The plaintiffs cannot initiate proceedings of condemnation, and it is difficult to see how they can obtain adequate remedy except by injunction. We fail to see how any great public mischief will be produced by compelling the city, within the time limited, to either make compensation for the property taken, or to provide proper means for the disposition of its sewage. Under the practice act, the plaintiffs were entitled to claim damages for the injury already done, and an injunction against its continuance.

Same—Discharging Sewerage—Injury to Property.

There is no error in the rulings upon evidence. The testimony of Mr. Platt that his foreman refused to take charge of the premises because of the stench was not admissible to prove the fact of the stench, but was admissible to prove the fact that the foreman refused to act on that ground. It was offered for no other purpose. Moreover, the fact of the stench was fully established by direct and proper testimony. The testimony of Franklin G. Newbert that he had refused to work on the plaintiffs' premises for a similar reason was not inadmissible because the refusal was made after the action was brought, although that fact might affect its weight. The court properly refused to admit the evidence referred to in paragraph 26. It was offered for the purpose of proving the construction of the act of 1881, and for that purpose was an irrelevant fact. For similar reasons, the evidence referred to in paragraph 27 was properly excluded. The defendant was not injured by the admission of evidence of a verbal notice given to the sewer commissioners, as notice to the city was duly proved. The complaint charged that the noxious substances committed to the river by the defendant produced certain deleterious effects upon the premises of the plaintiffs. It was competent for the plaintiffs, certainly in the absence of all objection, to show that this effect was accomplished by the current of the river deposit-

Evidence.

Same.

Same.

Same—Harmless Error.

Same.

ing these substances in the plaintiffs' pond and the canal leading to their manufacturing establishment, and the court did not err in finding that fact. There is no error in the judgment of the superior court. The other judges concurred.

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## CITY OF FERGUS FALLS

*v.*

## BOEN.

(*Supreme Court of Minnesota, Nov. 29, 1899.*)

**Sewers as Property of Municipality.**—Sewers are the property of the city in which they are built, and may be protected and controlled as any other property of the municipality. No private person has the power to interfere with them.

**Sewers—Failure to Assess Abutting Property—Fixed Charges—Waiving Irregularity by Connecting with Sewer.**—The city of Fergus Falls constructed a sewer in one of its streets, which sewer connected with the state hospital for the insane. The state paid one half the cost, and the city paid the other half out of what is known as a "permanent improvement fund," accumulated by taxation, that such improvements might be paid for without waiting for the collection of assessments. The charter provided for an assessment upon abutting property to pay the cost of constructing sewers, but no assessment was made in this instance. The city council then adopted a resolution, in which it was provided that connection might be made with the sewer by the payment of $33 for each house. The defendant indirectly connected with the sewer, but refused to pay. He made no effort to compel the council to assess for the cost of construction as provided for in the charter. *Held*, that when he connected his house with the sewer he waived the irregular action of the council, accepted the terms and conditions imposed by the resolution, and by implication promised to pay the amount fixed therein.

(Syllabus by the Court.)

APPEAL by plaintiff from Ottertail county district court. *Reversed.*

City of Fergus Falls *v.* Boen

*C. L. Hilton* and *Chauncey L. Baxter*, for appellant.
*Parsons & Brown*, for respondent.

COLLINS, J. Upon findings of fact the court below ordered judgment in favor of defendant, and the appeal is from an order denying a new trial, the claim being that, on the facts as found, judgment should have been for plaintiff. These facts are not at all complicated. The defendant city constructed a sewer in one of its streets, which sewer connected with the state hospital for the insane. One half the cost was paid by the state, and the other half by the city, out of what is known as the "permanent improvement fund." The city charter provided for an assessment of the cost of sewer construction in the city upon or against abutting property, but in this instance no assessment was ever attempted or made. The city council then adopted and passed a resolution in which it was provided that premises adjoining or on the line of the sewer might be connected therewith by payment into the city treasury of the sum of $33 for each house connection. The defendant owned a lot on the line of the sewer, with a frontage of 50 feet, and the court found that the sum of $33 was a reasonable charge against defendant for the privilege of connecting his premises with the sewer. Through an arrangement with an accommodating neighbor, who had made the connection, defendant indirectly connected his own premises with the sewer, and this action was brought to recover the amount fixed in the resolution. It is true that under the charter the cost of constructing the sewer should have been collected by an equal assessment of an equal sum per front foot on or against the property fronting on the street, including defendant's lot. The cost was advanced out of the permanent improvement fund, as authorized by the charter, and no steps have been taken to restore the amount taken from this fund, as might have been done, by frontage assessment. But it does not follow that defendant may, for this reason, disregard the resolution, and arbitrarily connect his premises with the sewer, built by the city out of moneys previously collected,

Case Stated.

and set apart as a fund out of which to pay for permanent improvements, without waiting for the collection of assessments upon benefited property. The power of a city to construct sewers is not given for governmental purposes, but is a specific grant, to be exercised for the general welfare of the municipality. Sewers are the property of the city in which they are built, and may be protected and controlled as any other property of the municipality. No private person has the power to interfere with them, for, if such person is unjustly and unreasonably deprived of privileges in connection with the use of such property which are granted to others, or which are his of right, he can speedily obtain redress in the proper tribunals. But he cannot be allowed to take the matter in his own hands and to disregard rules and regulations concerning such property which have been established and promulgated by authorities, although they may be unauthorized, and not exactly in accordance with the charter provisions. If it was the duty of the council of the city in question to proceed to collect the cost of construction by an assessment upon abutting property, and if there was a neglect of duty in this respect, the defendant, as a taxpayer, or as a frontage property owner, could have compelled the performance of the duty. He could have easily obtained an assessment to cover the cost and to reimburse the city,—exactly what he now insists is the only manner in which the cost can be collected. But this he has not done. Proceeding in his own way, and in defiance of the resolution, he has connected his premises with the sewer, and now refuses to pay the sum fixed as a condition for making this connection. His position is that, because the council proceeded improperly and irregularly by prescribing terms upon which the sewer could be used by the abutting property owners, instead of making the assessment under the charter, he may also proceed improperly and irregularly to connect his premises with it. He had no more right to do this than he would have had to

Sewers as Property of Municipality.

Sewers—Failure to Assess Abutting Property—Fixed Charges—Waiving Irregularity by Connecting with Sewer.

tap a water main or to connect with an electric light plant belonging to the city, simply because the authorities had proceeded in an improper manner when prescribing terms and conditions for using water from the main or current from the electric plant. And when the defendant proceeded to make the connection in question, and to avail himself of the sewer privileges, he waived the irregularity of the action of the council, accepted the terms and conditions imposed by the resolution, and by implication promised to pay the amount fixed therein. This sum the city can recover in a civil action. The conclusions of law of the court below are vacated and set aside, and on the facts as found judgment will be entered against defendant as demanded in the complaint.

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MOCK

*v.*

CITY OF SANTA ROSA *et al.*

(*Supreme Court of California, Oct. 19, 1899.*)

**Appeal—Review.**—As the appeal was taken from the judgment upon the judgment roll without any bill of exceptions, it was necessarily admitted by appellants that no errors were committed in the admission or rejection of evidence.

**Pleading.**—Except where there is no answer, a court of equity may grant any relief consistent with the case made by the complaint and embraced within the issue.

**Suit by Taxpayer for Return of City Bonds—Sufficiency of Complaint.**—In a suit by a resident taxpayer to cancel and have declared void a contract for the construction of waterworks for the defendant city, to prevent the construction of such work, and to have returned to the city treasurer the bonds issued by the city, and to prevent any disposal of them otherwise than for money to be paid into the treasury, to the intent that neither the bonds nor their proceeds should be used in payment of work and materials done and furnished under a void and fraudulent contract, it is not necessary for plaintiff to show that demand was made upon the city authorities to bring suit, where

the facts alleged in the complaint show that such a demand would have been useless.

**Same—Same.**—In such an action it is not necessary for plaintiff to show that demand was made for the return of the bonds, where it appears from the answer that such a demand would have been useless.

**Right of Taxpayer to Sue.***—Such a suit against the city, and its officers as such may be maintained by a resident taxpayer of the city.

**Public Officers—Acts in Excess of Authority—Liability to City.**—In such an action, the fact that the city officers are sued in their official capacity does not protect them from personal liability for costs, nor prevent a pecuniary liability on their part to the city, for having exceeded their official powers, from being established.

**Same—Liability for Neglect of Ministerial Duties.**—Where the law requires absolutely a ministerial act to be done by a municipal officer, and he neglects or refuses to do such act, he may, even in the absence of a statutory provision on the subject, be compelled to respond in damages for the consequences of his conduct.

**Action by Taxpayer—Plaintiff's Motives.**—In such an action by a resident taxpayer, the fact that plaintiff has ulterior motives for maintaining the action, such as a desire to serve the interests of a private water company by delaying the construction of the city's water works, will not disqualify him from prosecuting the action.

**Same—Parties.**—In such an action, the fact that the purchasers of the bonds were not made parties, is no ground for reversal, where it appears that they were beyond the jurisdiction of the court, especially where no fact is alleged that would affect their title to the bonds if they were parties.

**Same—Same.**—Where a defendant answered separately, and has not appealed, and is not complaining, the other defendants are not prejudiced by his being joined with them in a joint and several judgment which purports to entitle them to contribution from him.

**Sufficiency of Complaint.**—The contention that no loss was alleged to have been sustained by the city by certain change of plans was without merit.

**Appeal—Review.**—Neither a motion to strike out parts of the complaint, and to make the complaint more definite, nor the order denying the motion is any part of the judgment roll, and cannot be reviewed, on appeal from the judgment upon the judgment roll, in the absence of a bill of exceptions.

**Pleading—Parties.**—In the case at bar, there was no misjoinder of defendants or statements of different causes of action.

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*See State *v.* City of New Orleans (La.), 1 Mun. Corp. Cas. 122, and extensive *note*, 142 *et seq.*

Mock *v.* City of Santa Rosa

**Findings.**—In the case at bar, there appeared no failure to find upon any issue or question of fact which, if found upon favorably to appellants, would have changed the result.

**Action by Taxpayer—Consent of City Attorney.**—There was no merit in the contention that, under the defendant city's charter, a taxpayer, in the absence of a valid excuse, cannot bring an action for the benefit of the city, or one in which the city is a party, without the consent of the city attorney.

**Judgments—Modification.**—In such an action, a judgment under which the defendants found liable may receive benefit from the sale of the city's property, and the latter be deprived of that for which the bonds were issued, should be modified so as to avoid such results.

APPEAL by defendants from Sonoma county superior court. *Modified.*

*Russell & Campbell*, for appellants.
*Edward Lynch*, for appellee Mock.
*J. W. Goodwin*, for appellee Perkins.
*O. O. Webber* and *Thos. Rutledge*, for other appellees.

PER CURIAM. The plaintiff, a resident taxpayer of the city of Santa Rosa, brought this action against the following named defendants: "The city of Santa Rosa, as a municipal corporation; E. F. Woodward, as mayor of said city; the common council of said city, as the legislative body thereof; F. Berka, C. N. Collins, E. D. Harris, Thos. P. Keegan, George A. Tupper, and J. S. Wilson, as members of and composing said common council and the legislative body of said city of Santa Rosa; C. L. Mobley, as city clerk and auditor of said city; M. V. Vanderhoof, as treasurer of said city of Santa Rosa; Robert Effey; and Paul B. Perkins." Judgment was entered in favor of the plaintiff and the city of Santa Rosa, in whose behalf he sued, and defendant C. L. Mobley, and this appeal is taken therefrom by defendants Woodward, Keegan, Collins, Berka, Wilson, and Vanderhoof from the whole of said judgment, except that portion thereof in favor of defendant Mobley. Mobley, Effey, and Perkins do not appeal. A separate appeal (No. 1,599) is taken upon the same judgment roll by "the city of Santa Rosa,

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a municipal corporation, and the common council of said city, as the legislative body thereof," from the whole of said judgment, except that part in favor of Mobley. Both appeals are upon the same record, and may be disposed of in one opinion.

The record, though consisting of the judgment roll alone, without any bill of exceptions, is very long. The amended complaint covers 53 pages, the demurrer to it 12 pages, the answer 50 pages, and the findings and conclusions of law 69 pages. The facts involved are numerous, and dependent, and cover a period of time extending from the spring of 1893 to the time of the trial in December, 1896, so that the utmost condensation will necessarily require much space. The controversy has grown out of the issuance and disposal of bonds of the municipality for the purpose of constructing waterworks to furnish water for the use of the city and its inhabitants, the letting of a contract for the construction thereof, changes of plans, and other acts of the defendants connected with and forming part thereof, whereby the city, as the court finds, has sustained serious loss.

The judgment from which this appeal is taken is as follows: "(1) It is hereby ordered, adjudged, and decreed that the contract dated September 28, 1895, made by and between defendant the city of Santa Rosa, a municipal corporation, party of the first part, and defendant Effey, of the city of Santa Cruz, party of the second part, for the construction of a system of waterworks according to the plans and specifications of C. Monjeau, is hereby declared null and void and of no effect; and defendant the city of Santa Rosa is hereby absolved of and from any and all obligations whatsoever to any one under or by virtue of said contract. (2) It is further ordered, adjudged, and decreed that the bonds provided for in ordinance No. 163 of the ordinances of defendant the city of Santa Rosa, except the first series of said bonds, to wit, bonds numbers 1 to 5, inclusive, were unlawfully disposed of by defendants E. F. Woodward, individually and as mayor of said city, F. Berka, C. N. Collins, E. D. Har-

ris, Thos. P. Keegan, George A. Tupper, and J. S. Wilson, individually and as members of and composing the common council and legislative body of defendant the city of Santa Rosa, and M. V. Vanderhoof, individually and as treasurer of said city of Santa Rosa, and Robert Effey, and contrary to the provisions of law regulating the mode and conditions for the disposal of such bonds, and in violation of the trust reposed in defendants Woodward, Berka, Collins, Harris, Keegan, Tupper, Wilson, Vanderhoof, Effey, and Paul B. Perkins, willfully, unlawfully, and fraudulently disposed of the proceeds of said bonds, and that said defendants last named are adjudged to be liable for the payment to defendant the city of Santa Rosa of the value of said bonds at the time of their disposal, to wit, $165,701.25. (3) It is further ordered, adjudged, and decreed that the system of waterworks constructed by Paul B. Perkins in the city of Santa Rosa, consisting of pipe lines, reservoirs, pumping plants, and all other appliances connected therewith, be, and they are hereby, decreed to be the direct results of the disposal of said water bonds issued by the city of Santa Rosa under and by virtue of ordinance No. 163, and that, as such direct result, said waterworks constructed by said Paul B. Perkins should be, and they are hereby, decreed to be held and possessed by the defendants the mayor and common council of the city of Santa Rosa in trust for said city of Santa Rosa, and the inhabitants and taxpayers thereof, as if said works were a part of said water bonds, and that said defendants Robert Effey and Paul B. Perkins never had any lawful right, title, or interest in or to said waterworks, or any part or parcel thereof. (4) That an accounting shall be had by this court of the actual value of said system of waterworks, pipe lines, reservoirs, pumping station, etc., constructed by said Paul B. Perkins in said city of Santa Rosa, and that after said actual value of said waterworks is ascertained as herein provided, that a judgment shall be entered, to take effect as of the entry of this judgment, against defendants E. F. Woodward, F. Berka, C. N. Collins, E. D.

Harris, Thos. P. Keegan, George A. Tupper, J. S. Wilson, M. V. Vanderhoof, individually and as treasurer of said city of Santa Rosa, Robert Effey, and Paul B. Perkins, jointly and severally, for the amount of money which shall be found to be the difference between the value of said bonds at the time of their disposal, to wit, $165,701.25, and the ascertained value of said system of waterworks constructed by defendant Perkins. (5) That said city of Santa Rosa shall have the option to take and retain, as the property of said city, said system of waterworks constructed by said Paul B. Perkins, at the value thus ascertained, provided that the defendants hereby made liable for the deficiency aforesaid consent thereto; that, if such consent shall not be duly given and entered in this cause, then that said system of waterworks shall be sold by the sheriff of Sonoma county, acting as the commissioner of this court, to the highest and best bidder, at public sale, in the same manner as sales are made upon execution as provided by law; and the proceeds of such sale shall be paid to the treasurer of the city of Santa Rosa, and said city of Santa Rosa may, by its officers, become a purchaser at said sale; and, if said city should become the purchaser of said system of waterworks, the purchase price to be paid by said city shall be credited upon the amount of the liability of defendants named in the fourth clause of this judgment to said city, to wit, $165,701.25. (6) That upon the filing of the consent and agreement of all of the defendants made liable for said deficiency as to the value of said system of waterworks, or upon the return of the sheriff of the results of said sale, judgment for the amount of the deficiency, as provided in paragraph 4 hereof, and for the costs of plaintiff up to this time hereby taxed at $537.40, and for accruing costs hereafter incurred on behalf of defendant the city of Santa Rosa, or of plaintiff against said defendants made liable for said deficiency, shall be entered against said defendants as herein provided. (7) That defendant Mobley have and recover from plaintiff his (said Mobley's) costs, hereby taxed at $———."

As this appeal is taken from the judgment upon the judgment roll without any bill of exceptions, it is necessarily admitted by appellants that no errors were committed in the admission or rejection of evidence, and that the evidence sustains and justifies the findings; and in this connection may be noticed appellants' contention that the judgment is not authorized by the pleadings, and that facts occurring after the commencment of the suit cannot be considered in the absence of a supplemental complaint. The failure of the plaintiff to file an amended or supplemental complaint might have been a ground for excluding evidence of transactions occurring after suit commenced, but whether it would or not need not be considered; for, as was said in Poledori *v.* Newman, 116 Cal. 377, 48 Pac. 326: "Upon a direct appeal from the judgment upon the judgment roll alone, it will be assumed in support of the judgment that all objections to evidence in support of the findings were waived. If objection to the introduction of any evidence had been made upon the ground that the defect to which it related was not alleged in the complaint, the court would have permitted the plaintiffs to amend their complaint. Parties will not be permitted to lie by and keep silent when evidence is offered, and, after the court has rendered its judgment, object thereto, upon the ground that the evidence sustaining it was inadmissible under the pleadings." Besides, the answer of these appellants was filed more than seven months after this suit was commenced, and it was alleged therein that Perkins had nearly completed said waterworks, and for more than a month had been willing to turn the same over to the city; that appellants should at once commence supplying the city with water, and should not be interfered with in the exercise of their official duties,—thus voluntarily presenting issues as to facts occurring after the suit was commenced. But, for reasons above stated, it is not necessary to consider to what extent these allegations would have constituted a reply to the objection that evidence offered by the plaintiff was outside of the issues.

Appeal—Review.

It is also contended that the relief granted is not warranted by the prayer of the complaint. It often happens that the relief which would be appropriate to the facts and circumstances known to the plaintiff at the time he files his complaint, or which existed at that time, is inadequate and unsuited to the conditions existing at the time of the trial, resulting from the conduct or agency of the defendant; and hence it is usual to add to the prayer for specific relief appropriate to the facts alleged in the complaint the prayer for general relief, as was done in this case. All the appellants answered. Section 580, Code Civ. Proc., provides: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint, but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." The object of the suit, as disclosed by the complaint, was to cancel and have declared void the contract let to Effey for the construction of the waterworks, to prevent the construction of the works thereunder, and to have returned to the treasury the bonds issued by the city, and to prevent any disposal of them otherwise than for money to be paid into the treasury, to the intent that neither the bonds nor their proceeds should be used in payment of work and materials done and furnished under a void and fraudulent contract. So far as the judgment relates to the contract under which the work was performed, the judgment accords with the special prayer of the complaint. As to the bonds, it was alleged, on information and belief, that they were delivered to Effey, September 28, 1895; but the court, after finding the facts as to the disposal of the bonds, and the circumstances under which a deposit of $120,000 was made for the benefit of the contractor in the Santa Rosa National Bank, concluded that the validity of the bonds in the hands of the present holders was not affected by the present action, or by the conclusions of the court concerning the bid and contract for the construction of the works, and that, as the works as constructed were the direct result of

Pleading.

the disposal of the bonds, the defendants should be charged with the value of the bonds, and the city should hold the works as if they were a part of said bonds, and upon an accounting that appellants be credited with their value. This, I think, is entirely consistent with the pleadings and the issues actually tried, and is the nearest possible approach to the specific prayer that the bonds be returned and held until lawfully disposed of, and the proceeds placed in the treasury, and is consistent with the case made under the complaint, and fully authorized by the prayer for general relief. Section 580, Code Civ. Proc., is but a concise statement of the rule observed upon this subject in courts of equity. For a construction as to what is consistent with the case made by the complaint, see Hiern *v.* Mill, 13 Ves. 114, and Poledori *v.* Newman, 116 Cal. 375, 48 Pac. 325.

It is contended by appellants that no demand was made upon the mayor or council or anybody else for the return of the bonds or that suit be brought. The court found that a prior demand upon the municipal authorities to bring suit in the premises was, under the circumstances, not a necessary condition precedent to bringing the action. This is directly sustained by Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788, and Moyle *v.* Landers' Adm'rs, 83 Cal. 579, 23 Pac. 798. The facts alleged in the complaint sufficiently show that a demand to bring suit would have been useless; and, if it were conceded that a demand should have been made for the return of the bonds, it cannot avail the defendants as a ground for reversal of the judgment, since the answer disclosed that the bonds had been delivered to Effey, and by him sold to Seligman & Co., in the city of New York, and said purchasers and the bonds were out of and beyond the jurisdiction of the court, and further alleged that the complete construction of the waterworks had been paid for out of the proceeds of such sale. It therefore appears that a demand for the return of the bonds would have been useless, and that appellants are not injured by the omission.

Suit by Taxpayer for Return of City Bonds—Sufficiency of Complaint.

Same—Same.

In this connection appellants further contend that "the powers of a taxpayer plaintiff are limited, and can be extended only to acts or threatened acts of ministerial officers"; citing section 1243 of High on Injunctions. It is there laid down that equitable interference by injunction with legislative action by municipal bodies has given rise to some apparent conflict of authority, and is not wholly free from doubt; that purely legislative action will not be enjoined. But the author further says: "And, while courts of equity will not enjoin municipal bodies from the passage of ordinances or resolutions, yet after the passage of such ordinances or resolutions the courts may, and will, on a proper case being shown, prevent their enforcement; and for this purpose may enjoin proceedings thereunder which would otherwise result in irreparable injury." The cases of Merriam *v.* Board, 72 Cal. 517, 14 Pac. 137, and Linden *v.* Case, 46 Cal. 171, cited by appellants, do not support their contention. The defendants, except Effey and Perkins, are sued as officers of a municipal corporation, and are so described in the title of the cause, and are not referred to as "individuals," and are formally alleged in the complaint to be such officers; and all the acts complained of as having been done or performed by them were alleged to have been done and performed in the exercise, or pretended or assumed exercise, of official powers and duties; and the judgment fixes upon them, as individuals, a large pecuniary liability to the city of Santa Rosa, the amount to be determined by future proceedings, and gives judgment against them in favor of the plaintiff for costs.

Right of Taxpayer to Sue.

Appellants contend that, "If one is made a defendant in an official capacity, the judgment will not bind him personally;" citing Freem. Judgm. p. 285, § 156. The learned author is there treating of the effect of a judgment against a defendant in an official capacity as an estoppel against the same person when suing as plaintiff in a different capacity in relation to property rights, or title

Public Officers—Acts in Excess of Authority—Liability to City.

to property, and not, as here, where the misconduct of an officer, or one holding an official position, or acting in other than a personal or individual capacity, creates thereby a personal liability. Here the defendants were in fact officers of the municipality, and their several acts complained of were done and performed under color of this official authority; yet, having exceeded their powers as such officers, as charged in the complaint, whereby the municipality has wrongfully suffered loss, the recovery must be against them as individuals. But their several violations of official powers and duties could not be shown without showing their several official positions; and, besides, relief was also sought against them in their official capacities. They were, therefore, properly sued as officers, the judgment showing the character in which they were liable; and, so far as the character of the relief given by the judgment requires it, the official designation of the several defendants given in the complaint will be regarded as *descriptio personarum.* Stillman *v.* Squire, 1 Denio 329; Litchfield *v.* Flint, 104 N. Y. 543, 11 N. E. 58. In Scott *v.* Alexander, 23 S. C. 126, it was held that the fact that defendants were sued in their official capacity as aldermen did not protect them from personal liability for costs. In Evans *v.* Evans, 23 N. J. Eq. 72, the complainant was not styled "executor" in the commencement of the bill, nor were the defendants styled as "executors" in the prayer for process; but the bill, in its premises, fully stated the facts, and correctly described the character and relation of the parties. It was objected that the bill should have been filed by the complainant as executor against the defendants as executors. The chancellor said: "Proceedings in equity are conducted with less regard to mere matters of form and technical objections than proceedings at law. When a bill, in its body, sets forth facts which give the complainant a right as executor, or make the defendant liable as such, so that the court, upon these allegations, can give the relief required, it is mere form, and useless form, to require that each party should be so styled in the commence-

ment or conclusion of the bill." See, also, White *v.* Davis, 48 N. J. Eq. 22, 21 Atl. 187; Ransom *v.* Geer, 30 N. J. Eq. 249. Baldwin *v.* Ellis, 68 Cal. 495, 9 Pac. 652, was an action to recover taxes illegally collected. In the second cause of action the defendant was not sued as an officer, and a demurrer upon that ground was sustained. See, also, City of Blair *v.* Langtry, 21 Neb. 247, 31 N. W. 790; Nowell *v.* Wright, 3 Allen 166. In Amy *v.* Supervisors, 11 Wall. 136 it was said: "The rule is well settled that, where the law, requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect." And this, it was said, was a common-law liability, and is, therefore, not confined, as appellants seem to suppose, to those cases where the liability is imposed by statute.

Same—Liability for Neglect of Ministerial Duties.

It is further contended that the plaintiff is not the real party in interest, but that the action is prosecuted in the interest of the Santa Rosa Waterworks, a private corporation then supplying the city with water; and that this action is one of a series instituted to hinder and delay the construction of waterworks by the city; and that these allegations are not found to be untrue. The court found that one Jones, a taxpayer of said city, commenced an action in 1894 against the city, and which is still pending, to prevent the city from entering into a contract with Effey, upon the ground that his bid was not lawful, in which case the court, on February 26, 1895, gave an opinion, upon demurrer, that any contract made by the city with Effey upon said bid would be void. It does not appear that the defendants offered or gave any evidence tending to support said allegation that plaintiff is not the real party in interest, but, whether they did or not, the issue was immaterial. It is not disputed that the plaintiff is a resident and taxpayer, and therefore qualified to bring the

Action by Taxpayer—Plaintiff's Motives.

suit. In Mazet *v.* City of Pittsburg, 137 Pa. St. 548, 20 Atl. 693, it was held, in effect, that if the plaintiff is not a mere volunteer, but has a direct and substantial interest in the controversy, being one who is liable to be taxed, in common with the general public, for the work contracted for, his ulterior motives will not disqualify him. See, also, Times Pub. Co. *v.* City of Everett (Wash.), 37 Pac. 695.

It is also contended that J. & W. Seligman & Co. are necessary parties. Under the allegations of the complaint they were certainly proper parties, but it was alleged that they were in the state of New York, and, as they were beyond the jurisdiction of the court, they were not indispensable parties. The answer, however, alleges that the bonds were sold to them, and no fact is alleged, either in the complaint or answer, that would affect their title to the bonds if they had been parties. This is, therefore, not a ground for the reversal of the judgment.

Same—Parties.

It is further contended that, "the answer of Perkins being struck out by the court without authority of law, and the judgment, therefore, being void as to him, it is void as to all the defendants against whom said judgment was jointly given with him." Whether the answer of defendant Perkins was stricken out without authority of law, or whether the judgment against him exceeded the relief prayed for, would seem to be immaterial. He answered separately, has not appealed, and is not complaining; and we fail to see how these appellants are injured by Perkins being joined with them in a joint and several judgment which they say entitles them to contribution from him. Conceding, for the purposes of the argument, that no judgment could properly be rendered against him outside of the prayer of the complaint, it does not follow that the judgment against these appellants whose answer was not stricken out was in any way affected.

Same—Same.

It is also said that no loss is alleged to have accrued to the city by the change of plans made by Effey. The allega-

tions in the complaint were made in reference to the invalidity of the contract, and for the purpose of preventing its performance; but when the answer was filed—which was more than seven months after the suit was begun—the situation had changed, and it was alleged therein that the waterworks were substantially completed, that about 600 connections had been made with the mains thereof, and that water was then generally being used therefrom; and it was denied that any of the acts done by defendants subsequent to July, 1894, relating to the sale of said bonds or the letting of the contract, were had or done for the purpose of preventing competition, or in the furtherance of any plan to exchange the bonds for said work, and that the mayor and common council should not be interfered with in taking possession of said works. These allegations opened the door to an investigation of the change of plans, and the findings show many material changes, resulting in loss to the city and gain to the contractor, who had been paid in full for his work before it began. Not only so, but the complaint set out in full the contract made with Effey under which the work was done, and which provided that changes might be made by the city authorities; that, if the cost of the work was thereby increased, the contractor should be paid the additional cost, and, if diminished, the amount thereof should be deducted from the contract price, the amount of the increase or diminution to be agreed upon in writing in advance. The complaint also set out several resolutions, passed by the council after said contract was made, changing the said plans and specifications in several material particulars, and it does not appear that any agreement as to the increased or diminished cost thereof was made.

Sufficiency of Complaint.

The defendants moved to strike out parts of the complaint, and to make the complaint more definite and certain, and the motion was denied, and to the order denying the motion the defendants, and each of them, excepted. Neither the motion nor the ruling thereon is any part of the judgment roll (Code Civ. Proc. § 670), and can-

Appeal—Review.

not be reviewed on appeal from the judgment in the absence of a bill of exceptions (Spinetti *v.* Brignardello, 53 Cal. 283; Sichler *v.* Look, 93 Cal. 607, 29 Pac. 220).

Defendants also demurred to the amended complaint, all joining therein, upon many grounds, the general demurrer for want of facts being interposed as to all and to each of the defendants separately. The other grounds were for misjoinder of parties defendant, in that Mobley and Vanderhoof are unnecessary parties, because no cause of action is alleged against them; and similar grounds are alleged as to the improper joinder of other parties with certain other defendants; that the complaint does not show a joint cause of action against the defendants, and that defendants are not jointly interested in the several causes of action alleged, and that there is a defect of parties, in that Seligman & Co. are necessary parties. It is urged that some of the defendants have no interest in that part of the relief sought relating to the return of the bonds to the treasury, while others have no interest in the other part of the relief prayed for asking that the contract letting the construction to Effey be annulled or declared void. The municipal corporation known as the city of Santa Rosa, on whose behalf this action is prosecuted, had one object in view, *viz.* the construction of waterworks. The issuance and sale of the bonds, the adoption of plans and specifications for construction, the several steps leading up to and including the execution of the contract and the work done under it, were but the constituent parts of one entire thing, and all the defendants were connected with the proceedings. There was no misjoinder of defendants or statement of different causes of action in this equitable suit prosecuted by the plaintiff for and on behalf of the municipality, and that adequate relief required the presence of all against whom judgment was rendered. The general demurrer should have been sustained as to defendant Mobley, but judgment was rendered in his favor for costs. He has not appealed, and appellants are not injured.

Pleading—Parties.

The question whether demurrer or motion is the proper remedy where two or more causes of action are alleged, but not separately stated, need not be considered in view of our conclusion above stated, though appellants seem unable to distinguish between omitting to state separately causes of action that are of the same class, and may be united, and uniting in the same complaint, whether separately stated or not, causes of action of different classes, which the Code declares may not be done.

It is further contended that the court has failed to find upon many of the issues. Many, and, indeed, much the greater number, of the findings are of probative facts, and the alleged failures to make findings relate to these. Some of the findings are of facts occurring after the commencement of the action, and are referred to by appellants as "findings outside of the issues." These findings of probative facts seem to have been made in support of the findings of ultimate facts, and many that were made might have been omitted. Some issues tendered by the answer, it is true, were not passed upon,—as, for example, the character of the water furnished by the corporation known as the Santa Rosa Waterworks, and the insufficiency of that system as a fire protection; but such issues were immaterial. We are not, however, pointed to any failure to find upon any issue or question of fact which, if found upon favorably to appellants, would have changed the result; nor have we discovered any. The controlling findings of ultimate facts are, in substance, that the contract under which the waterworks were assumed to be constructed was void; that the construction of said works was paid for out of the proceeds of a sale of the bonds which was presumptively valid, and that the value of the works as constructed was much less than the value of the bonds, or the amount paid Effey under said void contract; and, as a conclusion of law, that the defendants, except Mobley, are liable for the difference between the value of the works as constructed and the sum paid to Effey.

Findings.

Some additional points made on the appeal taken by the city remain to be noticed. The brief filed in its behalf presents and discusses elaborately the questions discussed by the other appellants, and these have been noticed so far as space permits and their importance seems to require. It is contended that a taxpayer cannot bring an action for the benefit of the city, or one in which the city is a party, without the consent of the city attorney, unless some valid excuse is alleged and proved for not having requested him to bring it; citing section 21 of the charter of said city. St. 1875–76, p. 262. This section, so far as material here, provides: "It shall be the duty of the city attorney to advise the officers and authorities of the city in all legal matters pertaining to the business of the city; to prosecute all violations of the city ordinances, or noncompliance therewith, and shall represent the city in all suits in which the city may be a party." He is given "power" to sign informations and charges against persons for violating city ordinances, and to collect delinquent taxes. This section gives him no authority upon his own motion to commence suits for the city in other matters. He may advise, but he cannot control, the action of the city in relation to bringing suits other than those specially provided for in said section. He is but an agent of the city, with no power to compel his principal to act. There is, therefore, no merit in this contention.

Action by Taxpayer—Consent of City Attorney.

The appeal by the city from a judgment in its favor, based upon the contention that the judgment is wrong, and that no judgment should have been rendered in its favor, seems upon its face somewhat peculiar. There is, however, one ground upon which the city might properly seek a modification of the judgment. It is said by the city in its brief: "If the court adjudged those officers liable to the city for the proceeds of the bonds, and gave the city execution therefor, the municipality could have no objection. But when the property of the city is directed to be sold to pay the debts of these alleged wrong-

Judgments—Modifications.

doers, the city has a right to object, and does object most strenuously, to any such proceeding." There are certainly difficulties, together with possible injustice, in the way of a proper and just accounting and ascertainment of the value of the works in the mode expressed in paragraph 5 of the judgment. In paragraph 3 it is decreed that the waterworks constructed by Perkins be held and possessed by the defendants the mayor and common council, in trust for the city, as if said works were a part of the water bonds, and that Effey and Perkins never had any lawful right to said works. Paragraph 4 provides that an accounting shall be had of the actual value of said system of waterworks, pipe lines, etc., constructed by Perkins, and that said value be deducted from the value of the bonds, $165,701.25, and judgment entered against the defendants therein named for the difference. To this we see no objection. But paragraph 5 provides that the city shall have the option to take and retain said works as the property of the city, provided the defendants made liable for the deficiency consent thereto, and, if such consent be not given, that the "system of waterworks shall be sold by the sheriff to the highest bidder, and the proceeds of the sale paid into the city treasury, and credited upon the liability of the defendants liable for the value of the bonds." We see no difficulty in ascertaining the value of the works constructed by Perkins, and no reason why the defendants who are decreed to be held liable for the value of the bonds should have the privilege of refusing to consent to the value so ascertained, and thus compel a sale of "said system of waterworks" which already belongs to the city, and not to the other defendants. But, if a sale is to be had, what is to be sold? The water supply, the real estate upon which the works are erected or constructed, and the right of way belong to the municipality, and were not paid for by Perkins. If the whole system, including the water supply and real estate, be sold, the defendants held liable should not have the benefit of the additional value thereof, and, besides, the municipality would be wholly deprived of that for which

the people voted, and for which the bonds were issued, if an individual or private corporation should become the purchaser. The judgment should be modified so as to avoid the possibility of such a result.

The judgment is modified: (1) By striking out the fifth paragraph of said judgment. (2) By striking out all the first part of paragraph 6 down to and including the word "sale" in the fifth line of the said paragraph as printed in the transcript on page 261, and inserting in lieu thereof the following: "That upon the value of the work and material done and furnished by said Perkins in the construction of said waterworks being ascertained by the court,"—and, as thus modified, the judgment is affirmed, with costs against all the appellants in the appeal numbered 1,597, and without costs to either party in No. 1,599.

BEATTY, C. J., and TEMPLE, J., did not participate in the foregoing decision.

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MCINTYRE *et al.*

*v.*

BOARD OF COM'RS OF EL PASO COUNTY *et al.*

(*Court of Appeals of Colorado, May 14, 1900.*)

Parks—Dedication—Power of City.—Where land within a city is dedicated for a public park, the municipality holds the dedicated ground for the use and benefit of its citizens, for the purposes only of its dedication, and cannot impose upon it any servitude or burden inconsistent with such purposes, or tending to impair them.

Same—Same.*—A town proprietor who exhibits upon his plat a plot or square of ground not subdivided into lots, and who states to intending purchasers of lots that such square or plot of ground is reserved for a public park or any other public use, and who, upon the face of these representations, sells lots, thereby dedicates such ground to such public use as effectually as if he had expressly done so by deed.

*See *note*, 1 Mun. Corp. Cas. 763.

McIntyre *v.* Board of Com'rs

**Same—Same—Use of Land for Court House.**—If the dedication of a plot of ground was solely for a public park for the use and benefit of the citizens of the municipality, it is beyond the power of the municipal authorities to convey it or permit it to be used for the site of a county court house.

**Same—Same—Same.**—A county court house is not a public building of the city within which it is located, within the meaning of an ordinance of the city reciting that certain land dedicated for the use and benefit of its citizens is reserved for "public buildings, company building and parks."

**Same—Same—Reversion—Power of Legislature.**—Private property dedicated for a city park, in case of abandonment or failure to use the property for such purpose, reverts to him who dedicated, or attempted to dedicate it, and the legislature cannot destroy such reversionary interest.

**Same—Same—Right of Taxpayer to Prevent Diversion.***—A resident taxpayer of a city has the right to maintain a suit to prevent the diversion of property in the city from any public use, in which he shares, to which it has been dedicated.

APPEAL by plaintiffs from El Paso county district court. *Reversed.*

*Colburn, Dudley & Lewis, Richard Lea Kennedy,* and *J. C. Helm,* for appellants.

*Robert L. Hubbard* and *Joseph W. Ady,* for appellees.

WILSON, J. Plaintiff McIntyre, with four other residents, property owners, and taxpayers of the city of Colorado Springs, suing for themselves, as well as for all other residents, property owners, and taxpayers of the city, commenced this action to restrain the board of county commissioners of the county of El Paso, in which the city of Colorado Springs is situate, from the erection of a county court house upon a certain public square within the city, which it was claimed had been dedicated and used for 29 years as a public park. The complaint is very lengthy, and hence we shall insert only such portions of it as are requisite to a proper understanding of the issues and the questions presented and determined. It recites that in the

Case Stated.

*See Davenport *v.* Buffington (C. C. A.), 3 Mun. Corp. Cas. 224, and *foot-note.*

year 1871 the Colorado Springs Company, a private corporation, laid off and platted as a town site for the city of Colorado Springs a certain tract of land, of which it was the owner; that it filed in the office of the county clerk and recorder of the county a plat of said town site, showing the blocks, lots, streets, avenues, alleys, and reserved squares, to which plat was attached an acknowledgment of the vice president of the company, as required by law,—and then proceeds:

"Fourth. That all of the blocks designated upon said plat were divided into lots, except a certain block designated on said plat as block number sixty-two (62), lying two blocks north of Pike's Peak avenue, and marked on said plat as Acacia Place, and except a certain block designated on said plat as block number one hundred twelve, and lying two blocks south of Pike's Peak avenue, and marked on said plat as Alamo Square; neither of said two last-named blocks having lots designated thereon. That said Pike's Peake avenue runs east and west in said city, and is equidistant from either end of said platted ground. That said blocks designated as Acacia Place and Alamo Square are of equal size with all the other blocks within said platted ground; being about four hundred (400) feet square, and each bounded by streets on the four sides thereof.

"Fifth. That, at the time said plat was filed as aforesaid, said company laid off said ground as the original town site of the city of Colorado Springs; there being then only a few, if any, residents within the present limits of said city; it being the intention of said the Colorado Springs Company to place upon the market for sale the lots so designated and shown upon said plat.

"Sixth. That, with the purpose of inducing the public to purchase the lots as platted as aforesaid, which it immediately thereafter began selling to divers and sundry persons with reference to said plat, said Alamo Square and Acacia Place were reserved from sale, and it was then and there given out by said company, and so understood by the pub-

lic generally, and by those purchasing lots from said company in said platted ground, that both of said blocks of ground would be kept and reserved for the public for public parks; they having been reserved upon said plat as then provided by statute.

"Seventh. That soon thereafter both of said blocks of ground, Acacia Place and Alamo Square, were taken possession of by the city authorities of said Colorado Springs for parks, and were improved by the said city authorities, at public expense, for parks, and have ever since been maintained at public expense by the said city authorities for park purposes, being beautified by lawns, shade trees, public walks, water fountains, and seats for the accommodation of the general public; and the public for more than twenty (20) years last past have held the open, exclusive, continuous, uninterrupted, and peaceable possession of both of said blocks of ground for park purposes, and are now so using the same.

"Eighth. That the city of Colorado Springs now has a population of about 25,000, and the two blocks of ground aforesaid are the only parks in said city centrally located, and are convenient and necessary to the inhabitants thereof and the general public for the purposes to which they have been continuously devoted, and the public hold and own an irrevocable easement in said blocks for park purposes.

"Ninth. That heretofore, on or about the —— day of April, A. D. 1899, the defendants Sinton, France, and Doram, conspiring with the mayor and city council of the city of Colorado Springs to destroy the park situate on the said block of ground known as 'Alamo Square,' persuaded and induced said mayor and city council to pass an ordinance in words and figures following, to wit:

> "'An ordinance to provide for the relinquishment of all rights in and to block numbered one hundred and twelve, in the city of Colorado Springs, county of El Paso and state of Colorado, to the county of El Paso, upon certain terms and conditions, that the same may be used as a site for a court house for the said county.

" 'Be it ordained by the city council of the city of Colorado Springs:

" 'Section 1. Whereas, the Colorado Springs Company, a corporation, filed in the office of the clerk and recorder of El Paso county, Colorado, a plat of the original town of Colorado Springs, and reserved blocks sixty-two (62) and one hundred and twelve (112) for public buildings, company building and parks; and whereas, the county of El Paso, in the state of Colorado, is about to erect a new court house for said county: Now therefore, the city of Colorado Springs does hereby relinquish all its right, or rights, in and control over said block numbered one hundred and twelve (112) in favor of the said county of El Paso, for the purpose of permitting the said county of El Paso to erect a court house upon said block of ground for said county; the city reserving the right to enter in and upon the ground for maintaining its sewer and water systems and the expense to be borne by the county of El Paso for making any necessary changes upon said ground: provided, however, that only so much of said block shall be used by the county of El Paso, as may be necessary for the purpose of erecting thereon a court house consisting of one building, and for necessary paths and roadway for ingress to said court house and egress therefrom; and that all of the residue and remainder of the said block, numbered one hundred and twelve (112), not so used as above stated, for the erection thereon of said court house, shall be appropriately kept, properly planted and maintained as a public park, at the expense of the said county of El Paso, and the same shall remain a public park forever: provided, further, that if the said block of ground, or any part of it, shall at any time be used otherwise than for the purpose of building and maintaining a court house thereon, unless it be for the future enlargement of said court house, then, and in that case, all the rights and interests of the city of Colorado Springs in and to said block of ground, hereby granted to the said county of El Paso, shall immediately revert to, and become the property, rights and interests of the said city of

Colorado Springs, as the same existed immediately prior to the passage of this ordinance: and provided, further, that, if the said county of El Paso shall fail or neglect to maintain said grounds in a suitable condition for park purposes, as hereinbefore set forth, then, and in that case, the said county shall pay to the said city of Colorado Springs, each and every year such failure or neglect shall continue, the sum of five thousand ($5,000) dollars, which said sum shall be used and applied by the said city of Colorado Springs for the purpose of maintaining said block of ground for park purposes, and any surplus remaining of the said five thousand dollars, after making necessary expenditures upon said block of ground, shall be applied to the proper fund of the city of Colorado Springs to be used for the maintenance of the parks of said city.

" 'Sec. 2. The mayor of the city of Colorado Springs is hereby appointed as a commissioner to carry out the provisions of this ordinance, and to execute all conveyances necessary or proper in carrying out the provisions of this ordinance. All such contracts, agreements and conveyances shall be attested by the city clerk of the city of Colorado Springs, under the corporate seal of said city.' "

It then recites the execution by the mayor of the city, in pursuance of this ordinance, of a deed conveying to the county the premises in question, with the provisos and upon the conditions specified in the ordinance, to wit, that no part of the ground should be used by the county for any other purpose than the building and maintaining of a court house thereon, and providing, further, "that if the said county of El Paso shall fail or neglect to maintain said ground in a suitable condition for park purposes, as hereinbefore set forth, then and in that case the said county shall pay to the city of Colorado Springs each and every year during which said failure or neglect shall continue the sum of five thousand dollars ($5,000), which said sum shall be used and applied by the city of Colorado Springs for the purpose of maintaining said block of ground for park purposes; and any surplus

remaining of the said five thousand dollars, after making the necessary expenditures on said block of ground, shall be applied to the proper fund of the city of Colorado Springs, to be used for the maintenance of the parks of said city." The complaint further recites the execution on the same day of a deed by the Colorado Springs Company conveying to the county all of its right, title, and interest in and to the premises.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and on various special grounds, the nature of which will appear during the course of this opinion. The demurrer was sustained, and, the plaintiffs electing to abide by their complaint, judgment of dismissal was rendered, and the cause is brought to this court for review.

It is conceded in their argument by counsel on both sides that there was a dedication of the square to public use, and that it is sufficiently pleaded. The contention between them is as to the restrictions, if any, on its use and control by the city authorities, and as to whether the proposed use is inconsistent with the purposes and objects of the dedication. We are relieved, too, from the necessity of considering whether the dedication was a statutory one or one at common law, or whether the right which the city authorities possessed to control the square, and the people of the city to use it, is acquired by prescription. Under the facts of this case, the principles which control and determine are the same, whatever may have been the manner of dedication. It is not disputed, either, that the city of Colorado Springs acquired, and has the right to control and regulate the use of, this square, as trustee for the people of the city, and is bound to perform the duty. In such case it is well settled by the universal current of authority that the municipality holds the dedicated ground for the use and benefit of its citizens, for the purposes only of its dedication. The trustee cannot impose upon it any servitude or burden inconsistent with these purposes, or tending to impair them. Neither can it alienate the ground,

Parks—Dedication—Power of City.

nor relieve itself from the authority and duty to regulate its use. We cite a few of the very many authorities to this effect: Warren *v.* Mayor of Lyons City, 22 Iowa 351; City of Llano *v.* Llano Co., 5 Tex. Civ. App. 132, 23 S. W. 1008; City of Jacksonville *v.* Jacksonville Ry. Co., 67 Ill. 541; McCullough *v.* Board, 51 Cal. 418; Village of Princeville *v.* Auten, 77 Ill. 327; Harris Co. *v.* Taylor, 58 Tex. 690; Rutherford *v.* Taylor, 38 Mo. 315; Church *v.* City of Portland, 18 Or. 74, 22 Pac. 528, 6 L. R. A. 259; Kreigh *v.* City of Chicago, 86 Ill. 410; City of Alton *v.* Illinois Transp. Co., 12 Ill. 54; Le Clerq *v.* Trustees, 7 Ohio, pt. 1, 217. There is no question that the complaint sufficiently pleads a dedication of this square for the purposes of a public park. A dedication may be made without writing. It may be made by acts from which the intention to dedicate may be rightfully presumed, and with which any other presumption would be inconsistent. For instance, a town proprietor who exhibits upon his plat a plot or square of ground not subdivided into lots, and who states to intending purchasers of lots that this square or plot is reserved for a public park or for any other public use, and who, upon the face of these representations, sells lots, thereby dedicates the plot to such public use as fully and effectually as if he had expressly done so by deed. When the dedication is accepted, the proprietor cannot be heard thereafter to say that such was not the intent. To hold otherwise would be to allow him to practice a palpable fraud upon the public, and to take advantage of his own wrong. City of Alton *v.* Illinois Transp. Co., *supra*; Rutherford *v.* Taylor, *supra*; Abbott *v.* Mills, 3 Vt. 521; Washb. Easem. (4th Ed.) p. 239. If the dedication of the square in controversy was solely for the purpose of a public park for the use and benefit of the citizens of Colorado Springs, there is no question that it is wholly without the power of the city authorities to convey it or permit it to be used for the erection thereon of a county court house. It

Same—Same.

Same—Same—Use of Land for Court House.

would be a use utterly inconsistent with that for which it was dedicated. The term "park," in its ordinary and usual significance, imports a plot of ground in a city or town set apart for ornament,—a place which the residents of the municipality may frequent for pleasure and exercise or amusement. It is, besides, conducive to health; furnishing to the citizens of crowded cities a place where they may breathe the pure air, untainted by smoke and noxious gases. Certainly it cannot be contended that the erection of a large building in such a place, however massive, grand, or beautiful may be its architecture, to be used by either city or county for the carrying on of its business, is consistent with this use. Besides, if the ground is dedicated for a park, the citizens—the beneficiaries of the trust—are entitled to the use of the whole. If the trustee may be permitted to say that any particular part of it is not needed nor necessary for the dedicated purpose, then it may say that the larger portion of it is not so needed, and in fact defeat the whole purpose of the dedication. These views are fully sustained by the authorities which have been cited above.

The complaint does not state that there was marked upon the recorded plat any designation of the plot or square in question, except "Alamo Square." It alleges no words on the plat from which any dedication for a specific purpose might be inferred. The ordinance of the city, however, which is set forth in the complaint, recites in its first section that this block, with one other, was reserved for "public buildings, company building and parks." This may or may not be true, but, as counsel for both parties in their briefs argue the case upon the basis of its truth, we may infer that the recital is correct. This being true, counsel for the county strenuously urges that the proposed use is not inconsistent with that of its dedication, but is, on the contrary, a use expressly permitted by the terms of the dedication. This he maintains upon the ground that the county court house is a public building. A sufficient and complete answer to this is that

Same—Same—Same.

under no rules of construction could the words "public buildings," in the sense and under the circumstances there used, be construed to mean other than public buildings of the town or city. The town proprietors were laying out a town site. They made their subdivisions, plats, and their reservations solely with reference to the building up of a town, and to the promotion of its interests. True, a county court house is a public building; but so are a state capitol, a penitentiary, an insane asylum, school houses, and in fact all buildings erected and owned by state, county, or municipal authorities. If the contention of defendant is correct, then, without consulting the wishes of the municipality or of its people, for whose use this ground was dedicated, any buildings of the character which we have mentioned might be erected upon this ground. If its theory is correct, there was no necessity to secure a deed from, or the passage of an ordinance by, the city, giving the county the right which it attempted to confer.

The defendant insists, however, that a municipality holds and controls its property subject to the paramount authority of the legislature. This is true, as a general proposition, but there are restrictions upon, and limitations of, this legislative power. The rule is that, in cases of dedication of ground for specific use, in case of abandonment or failure to utilize the property for the specified use the property reverts to him who dedicated, or attempted to do so. Surely, it cannot be contended that in such case as this the legislature would have the power to destroy these property rights of an individual. This claim of defendant is based upon the provisions of subdivision 7, § 4403, Mills' Ann. St., originally enacted in 1877, which gives municipal authorities the power "to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve, streets, alleys, avenues, sidewalks, parks and public grounds, and vacate the same, and to direct and regulate the planting of ornamental and shade trees in such streets, avenues and public grounds." If there was a dedication of this ground

Same—Same—Reversion—Power of Legislature.

for public use as a park, it was long prior to 1877,—long after the rights of the beneficiaries of this trust had accrued. It was made, if at all, subject to the law as it existed before 1871, and we do not find in the old statutes a provision similar to the one upon which the defendant relies. By the statutes of 1868 (section 1, art. 3, p. 606, Rev. St. 1868), town authorities were given the power to vacate any street, avenue, alley, or sidewalk, and abolish the same, but we do not find any authority given for the vacation of parks. Waiving this question, however, and conceding that the statute of 1877 controls, it is of no avail to defendant in this case, because there is no attempted exercise of the power here given. The complaint in this case is not of any attempted vacation of this square or park, but of an attempted appropriation of a portion of it for a use inconsistent with the purpose of the dedication, and of an entire alienation and abdication by the city—the trustee of the people—of its right to control the possession and regulate the use of the square.

It is insisted, however, that in any event the demurrer was properly sustained on the ground that the plaintiffs have not the legal capacity to maintain the suit. This is based upon the doctrine that a private action cannot be maintained where the injury is purely a public one, unless the individual seeking relief is able to show some damage special or peculiar to himself. This well-settled legal principle is not applicable to cases like the one at bar. On the contrary, the doctrine established by the great weight of authority, is that a resident taxpayer of a municipality has the right to maintain a suit to prevent the unlawful disposition by the municipal authorities of the money or property of the town, and to restrain the diversion of property in his town from any public use, in which he shares, to which it has been dedicated. Davenport v. Buffington, 38 C. C. A. 453, 97 Fed. 234; Rowzee v. Pierce (Miss.), 23 South. 307, 40 L. R. A. 403; Crampton v. Zabriskie, 101 U. S. 601, 25 L. Ed. 1070; Cummings v. City of St. Louis, 90 Mo. 261, 2 S. W. 130; 2 Dill. Mun.

Same—Same—Right of Taxpayer to Prevent Diversion.

Corp. §§ 653, 915; Carter *v.* City of Portland, 4 Or. 339; Packard *v.* Board, 2 Colo. 350. The reason upon which the rule is based is thus aptly expressed by MR. DILLON: "If the property or funds of such a corporation be illegally interfered with, ordinarily the action to prevent or redress the wrong should be brought by and in the name of the corporation. But if the officers of the corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant, and particularly any taxable inhabitant, be allowed to maintain a suit to prevent or avoid the illegal act? Such a right is especially necessary in the case of municipal and public corporations, and, if it be denied, they are liable to be plundered, and the taxpayers and property owners, on whom the loss will eventually fall, are without effectual remedy." This doctrine is not in conflict with the rulings of our supreme court in the cases to which we have been cited. Whitsett *v.* Railroad Co., 10 Colo. 243, 15 Pac. 339; Railway Co. *v.* Foley, 19 Colo. 280, 35 Pac. 542; City of Denver *v.* Girard, 21 Colo. 450, 42 Pac. 662. The principle announced in these applies to cases in which the city council, in the exercise of its acknowledged legal power, confers a license for some unusual use of a street, or concerns nuisances. The principle which controls in this case has been affirmed, in accordance with the views which we have expressed, by our supreme court. In Packard *v.* Board, *supra*, the court said: "The right of taxable inhabitants and property holders to resort to equity to restrain misuse of public property and misapplication of public funds has been denied in New York and elsewhere, but we incline to the opposite view, which is also supported by many authorities." The doctrine there announced has never been controverted in this jurisdiction. The city is not a necessary party to this suit. It is an action to restrain the commission of a trespass upon the public property dedicated for the use of the people of the municipality. Adequate relief can be given, and all issues determined, without bringing the city in as a party. It is the county authorities who are seeking to use

the property in question for a purpose foreign to its dedication, and the suit against them is in the nature of a suit by a *cestui que* use to prohibit a violation of the trust, or a destruction of the right of user.

Entertaining these views, it necessarily follows that, in our opinion, the court erred in sustaining the demurrer. The judgment will therefore be reversed, and the cause remanded for further proceedings in accordance with this opinion. Reversed.

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REDERSHEIMER

*v.*

FLOWER, MAYOR, *et al.*

(*Supreme Court of Louisiana, June 4, 1900.*)

**Municipal Improvements—Right of Taxpayer to Enjoin Signing of Contract—Effect of Decree of Nullity on Accepted Contracts.***—A taxpayer and abutting proprietor has a right of action, on sufficient cause alleged, to enjoin the proposer and the bidder from signing a public contract to carry out the terms and conditions of the award.

On the Merits.

Where the circumstances render it proper to set aside all steps taken to award a bid to an asserted lowest bidder, the nullity may be decreed without trenching upon contracts that have been accepted and are being executed.

(Syllabus by the Court.)

APPEAL by defendants from parish of Orleans civil district court. *Affirmed.*

*Buck, Walshe & Buck*, for appellant Spinks.

*Samuel L. Gilmore, City Atty.*, and *Walter B. Sommerville, Asst. City Atty.*, for appellant City of New Orleans.

*E. Howard McCaleb*, for appellee.

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*As to right of taxpayers to enjoin an illegal disposition of municipal funds, see State *v.* City of New Orleans (La.), 1 Mun. Corp. Cas. 122, and extensive *note*, 142 *et seq.*

Redersheimer *v.* Flower, Mayor

BREAUX, J. Plaintiff, a citizen, taxpayer, and owner of land on the street it is proposed to pave, instituted this action and sued out an injunction to prevent defendants from carrying out a contract for the paving with asphalt of St. Charles street, from Canal street to the terminus of the present asphalt pavement around Lee Circle. The grounds of complaint are that defendants required, in the proposal for bids, that all rock asphalt used in the pavement be mined from one or more of the natural deposits; that that from the Sicilian mines at Ragosa should equal in quality and composition that mined by the United Limmer & Vervohle Rock-Asphalt Company, and that that from the Swiss mines at Val de Travers should equal in quality and composition that mined by the Neuchatel Rock & Asphalt Company, or that that coming from the French mines at Seysel should equal in quality and composition that mined by the Compagnie Generale des Asphaltes de France. The ground of complaint, in the second place, is that, under the head of "Sample" in the specifications, the successful bidder was required to deposit as a model a sample, not less than one foot square, of the wearing surface of the sheet asphalt which had been in actual use in a street, together with a written account of its composition, and a certificate from the city officials where it had been in use showing the time it had been used on the street in which it was laid, and setting forth that the number of square yards laid was not less than 1,000. And, lastly, the successful bidder was required to satisfy the proper municipal authorities that the third course or wearing surface of the sheet asphaltum or of the rock asphalt was all that it is represented to be, by furnishing testimony of its having been in successful use in roadway pavements in one or more cities for a period of at least five years. The proposal was for the construction of a pavement of sheet or rock asphalt, the one being considered of equal value to the other, and the specifications, as relates to the proposals for bids, were intended for both. They were both treated as being on the same footing and as being of equal grade. It appears that the difference between the two, the

rock and the sheet asphalt, is not considerable. The sheet asphalt has very nearly the same proportion of ingredients as the rock asphalt. When laid in a pavement, they amount, as relates to use, to about the same thing. One is a natural product of the mines, and the other is artificial,—an imitation of equal value to the original. The adjudicatee of the contract is H. C. Spinks, who proposes to furnish Sicilian rock asphalt on six-inch concrete at $2.58 per square yard. The lowest bidder was J. M. Kelly, who proposed to construct the pavement of sheet asphalt on six-inch concrete at $2.40 per square yard. The third bidder was the Barber Asphalt Company, whose bid was larger in amount than either of the two just named. The defendants severed in their defense. The city and the mayor filed a plea of general denial, while Spinks filed an exception of no cause of action and the general denial. We think that the foregoing is a sufficient outline of the case. In the course of the discussions, we will state such other facts as may be deemed needful.

As relates to the exception of no cause of action, we know of no good reason why the action of the lower court in overruling this exception should not be sustained; for if, as charged by the plaintiff, the statute has not been complied with, plaintiff, who is a tax payer and owner of property abutting on the street to be paved, has a standing in court to prevent its infringement and sustain his allegations of injury to his interests. The right of the property owner to sue out an injunction and compel obedience to a statute has always been recognized upon allegations of threatened injury made in apparent good faith. Where the charter requires that a contract be awarded to the lowest bidder, and it has not thus been awarded, the taxpayer may enjoin and prevent the consummation of the contract, and bring about a readvertisement for bids. The exception is overruled.

On the Merits.

At the outset of the discussion, we are confronted with the statutory provisions requiring that the contract be

awarded to the lowest bidder. To the council is given the right to advertise for bids to construct pavements. The Sicilian rock asphalt was, in view of the guaranty offered, considered the lowest bid for work advertised by the council. The testimony shows that the material in question is of a superior quality. The difficulty grows out of the fact that it is obtained from one of the few mines mentioned in the specifications (that is, by special mention in the specifications), and in that way, plaintiff urges, competition was stifled. It is true that rock asphalt is obtained in large quantities in many places. It is also true that it varies in its composition, and that much of it is of inferior quality. For this reason defendants contend, in support of the specifications which plaintiff asserts are offending and injurious, that a standard must be adopted in order to protect the city against worthless materials. We are not inclined to deny the truth of the proposition. In view, however, of the provisions of the charter requiring competition in matter of bids, we are disposed to think that the specifications in question should be expanded a little and liberalized somewhat. While the lowest bidder should not be afforded the opportunity of using untried and worthless materials, on the other hand the standard or grade of materials required should be broad enough to embrace, if not absolutely all, at least a goodly portion, of the first-class material offered for sale. Rock asphalt is not *res incognita.* It has been known from time immemorial, and surely a standard of quality can be adopted without limiting bids to three or four mines. We are informed by the evidence that the foreign product of the rock-asphalt mines referred to was selected chiefly for the reason that domestic rock asphalt has not given satisfaction as a pavement. None the less, we do not find in the record sufficient reason for excluding all mines save those mentioned in the specifications. There are many other mines than those before mentioned which produce a pure and durable quality of rock asphalt. Even domestic rock asphalt, although it has not

yet found its way freely into the markets, is entitled to a hearing.

The specifications set forth that "*all rock asphalt* used in this pavement must be natural, bituminous, limestone rock mined from one or more of the natural deposits." (Italics ours.) This positively excludes all rock asphalt, and particularly the domestic, save that before named. It is true that the testimony shows that domestic rock asphalt has never proven a success, unless it has been mixed with other kind of asphalt. To that extent, at least, it might, perhaps, be given some little consideration. But under these specifications the domestic rock asphalt would not have even the scant privilege of being mixed with foreign asphalt, and thereby gain some little success. Those who deal in and control sheet asphalt are permitted to bid on sample and testimonial of successful use in any other city for a number of years. The restriction for the bid is not great, and we believe that, as to the two-years limit, it is entirely reasonable. We understand that, being an artificial product, there was no necessity to limit it as to locality or to certain designated mines, as in the case of rock asphalt. Would it not be reasonable to conclude that, if sheet asphalt is not limited at all as to locality, the rock-asphalt limits as to locality should be made as large as possible, and not restricted to a very few mines, which may be under such control as to hold the material (rock asphalt) at a higher price than it would be held at if brought into regular competition? One being the competitor of the other, the price of one has its influence over the price of the other. In expressing these views, we are not to be construed as holding that any bidder can insist upon the acceptance of his bid without regard to the quality of the material he is to use. He should, above all other considerations, satisfy the authorities that the material he proposes to use is of the quality required. Great care should be taken not to burden the streets with bad pavements.

This brings us to a consideration of plaintiff's objection to

certificates to be obtained from those in charge of pavement construction in other cities. In view of the great care and diligence required in the selection of good materials, we are not disposed to find fault with the methods adopted to obtain certificates of good service for two years from some responsible person in authority. We are informed by the testimony that actual use in the streets for at least two years is the only reliable method of ascertaining whether the paving material is good or bad. Defendants, as a further guaranty from bidders, prior to bidding, inserted another requirement in the specifications; *i. e.* a requirement regarding the surface of the pavement. This part of the specification calls for evidence of successful use of the pavement proposed by the bidder for five years. We have not found that this last requirement is directly sustained by evidence of the necessity of a so many years' test. From our point of view, after the quality of the asphalt, be it rock or sheet, is ascertained by a laboratory test and satisfactory use of the material for two years, an additional period of three years is a very long time. If there is necessity for additional time to investigate, it might be made, we think, less than three years additional. In Bergoffen *v.* City of New York, 23 N. Y. Law J. 206, 64 N. Y. Supp. 1082, to which learned counsel for the defendants have directed our attention, the two-years certificate was sustained as legal, and at the same time as ample.

We have expressed our views regarding the specifications. We think that they should be broader and more comprehensive, so as to render it safe beyond all possible question. The lowest bid, that of Kelly, as his bid did not comply with any of the specifications as required, was not accepted for good reason. After it was rejected, as an independent question, it would have been better if the proposal for bids had been readvertised. Now that the questions have been passed upon, the specifications should be broadened. We think that the proposals for bids should be readvertised, and that the

Spinks bid should be set aside. That is the extent of our conclusions, although we have decided views, as indicated by our opinion, on the other subjects discussed. They are not intended to, and we do not think that they tend to, invalidate or in any way affect a contract for paving that has been accepted and that is now being executed. We deem it proper to state that no unfairness is charged in the pleadings. If any error has been committed, it grew out of the desire, as we take it, of protecting the interest of the city. In order to avoid error or mistakes, it requires unusual knowledge of such matters. They are full of difficulties. MacAdam, the engineer, and "the Scottish trustee of roads," although he succeeded in acquiring fame, did not establish a system or plan always satisfactory in constructing and macadamizing roadways. Many difficulties arise and are to be considered. The drainage of the soil, the grading, the quality of the material to be used, the skilled workmanship required, the climate, the traffic, and other considerations must be taken into account. Small wonder it is, then, that those in charge find it necessary to insert many requirements in specifications; and for that reason we think that the courts should be slow in setting aside an accepted contract that is being satisfactorily executed, although it is different before acceptance.

For the reasons here assigned, the judgment of the district court is affirmed, in so far as it sets aside the bid of H. C. Spinks and annuls all acts looking to the signing of a contract to carry out the terms of his bid.

FRAZER *et al.*

*v.*

CITY OF CHICAGO.

(*Supreme Court of Illinois, June 21, 1900.*)

**Pest Houses—Injury to Property—Eminent Domain—Liability of City.***—The erection and proper maintenance, under legislative authority, of a properly located smallpox hospital by a city cannot be a taking or damaging of private property in the vicinity of the pest house, within the intent and meaning of section 13 of article 2 of the constitution of Illinois, providing that private property shall not be taken or damaged for public use without just compensation.

**Same—Liability of City.**—A city cannot be held liable for the application under legislative authority, of its property for the use of a smallpox hospital, where the pest house is rightfully located and well conducted.

APPEAL by plaintiffs from Cook county circuit court. *Affirmed.*

*Miles S. Gilbert* and *Wm. C. Gilbert* (*Gilbert Bros.*, of counsel), for appellants.

*Charles M. Walker*, Corp. Counsel, and *Thomas J. Sutherland*, for appellee.

PHILLIPS, J. Appellants brought suit against the city of Chicago, seeking to recover for damages to their property by

*JUDGE DILLON, in his able work on municipal corporations (§ 587d, 4th Ed.), expresses the opinion that the diminution in the market or actual value of private property in the vicinity resulting from the act of a city in condemning land, under legislative authority, for the purpose of establishing a hospital thereon, is not a taking of private property, within the meaning of a constitutional inhibition against taking private property for public use without just compensation. And see generally, L'Hote *v.* City of New Orleans (U. S.), 3 Mun. Corp. Cas. 561, and *foot-note*.

reason of the erection, maintenance, and intended maintenance by it of a smallpox hospital on property belonging to the city, situated on the east side of Lawndale avenue, within the city. The property of plaintiffs is unimproved, and is situated on the west side of Lawndale avenue, between West Thirty-Third and West Thirty-Fifth streets, and is directly opposite blocks 7 and 8 in Cass' subdivision,—property owned by the city, on which it built its hospital, which was opened for use December 10, 1896; said property being acquired by the city, and said smallpox hospital being erected, after plaintiffs acquired title to their lands on the west side of Lawndale avenue. Plaintiffs' declaration consisted of five counts, and, without giving the substance of each count in detail, charges that the hospital was erected within 50 feet of, and facing, Lawndale avenue; that the hospital has received, in the two years since it has been opened, 100 smallpox patients; that Chicago has a population of 2,000,000; that there are annually a large number of people afflicted with the disease known as "smallpox"; that the maintenance of this hospital for the purpose of isolating those so afflicted has damaged, and will greatly damage, plaintiffs' lands, in a way not common to the general public; that smallpox is a highly contagious disease, and nearness of the hospital frightens persons, and renders plaintiffs' property much less adapted for investment purposes, and limits the use which plaintiffs might otherwise make of their lands; that such acts of the defendant constitute a permanent injury for the benefit of the public, within the meaning of the section of the constitution prohibiting the damaging of private property for public use without compensation, and unreasonably limit the use to which plaintiffs' lands might be put, whereby plaintiffs have sustained special damage not common to the general public; that it became necessary to collect all persons afflicted with smallpox into one place, to guard against the spread of the disease, and to facilitate treatment, and the collection of such patients at the place described renders ingress and egress to and from plain-

Case Stated.

tiffs' property upon and over Lawndale avenue (by which public highway alone egress and ingress were then and are now possible) unsafe and dangerous to travel upon foot or in carriages or other vehicles, and greatly interferes with private property rights which plaintiffs, as owners of land adjoining said highway, have as appurtenant to their premises, rendering said land much less adapted for investment purposes, for leasing, and for subdivision into city lots, for building sites, for the erection of dwellings for rent, and much less suitable for manufacturing sites and for residence, and that thereby the market value of plaintiffs' lands has been and is greatly decreased, to wit, $15,000. A general demurrer to the declaration was sustained, and, plaintiffs electing to stand by their declaration, judgment was entered dismissing the suit, and against plaintiffs for costs, to reverse which this appeal is prosecuted.

Appellants contend that the acts set forth in their declaration constitute a taking or damaging of private property for a public use, within the intent and meaning of section 13 of article 2 of the constitution, providing that private property shall not be taken or damaged for public use without just compensation. The position of the appellee is that, a necessity existing for the establishment of a smallpox hospital, it was within the police power of the city to locate the same on its own property, and that any loss suffered by the plaintiffs is *damnum absque injuria*, or that, in contemplation of law, the loss sustained by the plaintiffs is compensated for in the benefits received thereunder, and that no compensation can be had for the injuries sustained. The case at bar presents no taking of private property. Neither is there a physical injury. Nor does it fall within that class of cases where, notwithstanding there has been no taking or physical injury, together with resulting damages, yet the intrinsic value of the property is lessened by reason of access being interfered with or its accessibility is prevented or impaired. The real injury alleged, and for which plaintiffs seek a re-

Pest Houses—Injury to Property—Eminent Domain—Liability of City.

covery, is the menace to the health of the inhabitants in the vicinity of the hospital, or, rather, to those inhabitants who in the intended future use of plaintiffs' property might become residents in the vicinity thereof, and who, by reason of its location, would be deterred from purchasing plaintiffs' property, and the consequent loss in the speculative value thereof. Neither does it appear from the declaration that the city has been careless or negligent in the maintenance of the hospital, or that by reason of any act of omission or of commission on the part of the city it has become a nuisance to any greater extent than is inherent to the location and use of such an institution. Counsel for appellants, in their brief, state: "We are not here complaining of any negligence of the city. We assume that the pest house is rightfully located and well conducted." The demurrer admits the facts well pleaded in the declaration. Does the declaration set forth a cause of action? The seventy-seventh clause of section 1 of article 5 of the city and village act expressly gives power to the city "to erect and establish hospitals and medical dispensaries, and control and regulate the same." The establishing of this smallpox hospital was therefore clearly within the police power of the city, and it is clear, therefore, that in the absence of carelessness or negligence, or of an abuse of that power in any way, the hospital could not be a public nuisance. Nor could it be a private nuisance unless it should become such in its subsequent use or unwarranted operation, having in view the peculiar conditions under which it was established and maintained. In Rigney *v.* City of Chicago, 102 Ill. 64, this court said (page 80): "There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law does not and never has afforded relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property; yet that is clearly a case of *damnum absque injuria*." In Oliver *v.* City of Worcester,

102 Mass. 489, the court said: "The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, as the management of property and rights held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public. In the one case no private action lies unless it be expressly given; in the other there is an implied or common-law liability for the negligence of the officers in the discharge of such duties." In Village of Carthage *v.* Frederick, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, the court, in speaking with reference to the police power, said: "Municipal corporations have exercised this power for time out of mind, by making regulations to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or peculiar loss, as each member of a community is presumed to be benefited by that which promotes the general welfare. All authorities agree that the constitution presupposes the exercise of the police power, and it is to be construed with reference to that fact." In Sedgwick on Constitutional Law (page 435) it is said: "The clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given."

Appellants concede the well-settled rule that private property, itself a nuisance and obnoxious to the health or safety

of a community, may be abated by a municipality, under its police power, without being liable for resulting damage to the owner thereof, but insist that this case presents a condition where private property, itself unoffending, and owned and acquired without any infringement of the property or personal rights of others, has been injured to a degree greater than the property of others so held and owned by them, and that the guaranty of the constitution that private property shall not be damaged for public use without just compensation therefor applies. Conceding that the declaration shows special injury to the appellants in excess of that shared by them with the general public, it could only be under this constitutional provision that a recovery could be here maintained. The law is well settled that where a thing not *malum in se* is authorized to be done by a valid act of the legislature, and it is performed with due care and skill, in strict conformity with the provisions of the act, its performance cannot, by the common law, be made the ground of an action, however much one may be injured by it. Rigney *v.* City of Chicago, *supra*. In support of appellants' contention that the acts complained of here are actionable under our constitution, reliance is placed, among other cases, on the Rigney Case, *supra*; Railway Co. *v.* Darke, 148 Ill. 226, 35 N. E. 750; and Insurance Co. *v.* Heiss, 141 Ill. 35, 31 N. E. 138. There is a marked difference in the use by a city of its property carefully, prudently, and without negligence, in the reasonable exercise of its police power, and that of the change of grade of streets, the building of a viaduct, the closing of a street or alley, or the inconvenience caused by the use and operation by a railroad company of its property. In the case of the change of grade the measure of damages allowable is the difference in the value of the property before and after the making of the improvement, taking into consideration the increased value of the improvement to the property itself. Nor, as above indicated, can there be any recovery for damages sustained, shared by the public in common. Supposed damages growing out of the proper exercise of the police

power must be considered *damnum absque injuria*, in the theory of the law that the plaintiff is compensated for the injury sustained by sharing in the general benefits which are secured to all by reason thereof. As stated by Dillon in his work on Municipal Corporations (volume 1, § 212): "Every citizen holds his property subject to the proper exercise of the police power, either by the state legislature directly, or by public or municipal corporations, to which the legislature may delegate it. * * * It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. * * * If one suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

But finally appellants contend that it is an unreasonable, unusual, and extraordinary use of property to utilize it for the segregation of contagious diseases, and cite in support thereof Kobbe *v.* Village of New Brighton (Sup.), 45 N. Y. Supp. 777; City of Baltimore *v.* Fairfield Imp. Co. (Md.), 39 Atl. 1081, 40 L. R. A. 494; and Com. *v.* Alger, 7 Cush. 86. Under the express delegation of power by the legislature, we cannot hold that the application of property for the use of a small-pox or other hospital is such an unusual or unreasonable use of property as would take it out of the police power of the city, so as to render it liable for such application, when, as here, it is conceded that the pest house is rightfully located and well conducted. In the case of City of Baltimore *v.* Fairfield Imp. Co., *supra*, the complainants sought by injunction to restrain the city of Baltimore from placing and keeping on a 20-acre tract of land owned by the city a woman afflicted with leprosy, which land of the city adjoined lands of the complainants. There is a wide difference between the establishing and maintaining of a hospital for the treatment of disease, and in appropriating a piece of property for

Same—Liability of City.

the keeping of a single patient by an unskilled laborer and his family, having no knowledge of the disease of leprosy, with which the patient was afflicted. The facts appearing in that case might well have justified the interference by the court, by injunction to restrain the use, having reference to all the surrounding conditions, and yet not militate against the view we have taken, that annoyance or damage resulting from the rightful location and proper conducting of the hospital in question offers no basis for relief in damages. As was said in that case: "The evidence shows that the health authorities propose to place this woman in the charge of a laborer and his wife. They are unskilled people. They possess no authority to restrain the woman from wandering away, and they have no legal right to detain her against her will. They are not officers of the city, nor clothed with any of the powers of the board of health. They are simply employed by the city to care for this woman on the city's property, where no health officer or city official is stationed." In commenting on the right to the exercise of the police power, the court, with reference to an unreasonable exercise thereof, say: "Whatever immunity a municipality may have in exercising a public as contradistinguished from a strictly corporate power, it does not result from some collateral act, or from the negligent doing of a permissible act. The infliction of an injury upon another is neither the natural nor necessary result of an exercise of the power to build a hospital, but, if injury does ensue, it would result from the collateral circumstance that the place selected was not the appropriate site, or from the negligent method of doing what would otherwise be a lawful act." And this case recognized the doctrine that for the doing of an act clearly within the power of the city under its police power, where injury is the necessary result of the doing thereof, no redress can be had. The court say: "The statute law of this state confers upon the mayor and city council plenary power to establish, both within and beyond

the city's limits, hospitals and pest houses for the isolation and treatment of contagious and infectious diseases. The preservation of the public health renders such legislation highly essential, and the authority of the general assembly to enact it in the exercise of the police power of the state is beyond question or controversy. Within the scope of the power thus granted, the whole authority of the state is included and delegated. Harrison *v.* Mayor, etc., 1 Gill 264. And, therefore, whatever the state may directly do in furtherance of these objects the municipality clothed with the delegated power from the state may also lawfully perform, though there may be a difference as to the legal consequences resulting from an exercise of the power by the state directly, and those flowing from an exertion of the same power by the municipality. If it be conceded that the state may, in exercising a public power, create a private nuisance with immunity, the immunity grows out of the public necessity, and rests upon the state's sovereignty; but it cannot, or, at all events, will not, in the absence of an explicit legislative delegation, be assumed that the state would, if directly exercising the same power, so exercise it as to produce or cause an injury to the rights of property to an individual, unless, perhaps the very doing of the act directed to be done will necessarily and unavoidably, under any condition, result in the creation of what would be, but for the authorization, a private nuisance." We can see no difference, in principle, between the right of a city to establish and maintain a small-pox hospital, and to erect and use jails, fire-engine houses, calabooses, and the like. Greater care might be required in the maintenance of one than the other, and different considerations would undoubtedly enter into the selection of a site of a pest house than of the fire-engine house or jail; but the city would be liable only for an abuse of authority or an unwarranted exercise of discretion in locating or maintaining the same, having reference to the present necessities, the crowded condition of the locality in which they are placed or

maintained, and other pertinent facts and circumstances. The declaration does not seek to charge any act of omission in this regard. The demurrer was properly sustained, and the judgment of the circuit court of Cook county is affirmed. Judgment affirmed.

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## McAULIFFE

*v.*

## CITY OF VICTOR.

(*Court of Appeals of Colorado, Sept. 10, 1900.*)

**Municipal Corporations — Liability for Negligence of Prison Keepers.***—A city cannot be held liable for injury to a prisoner confined in its calaboose for violation of one of its ordinances, although the injury was caused by a fire spreading in the calaboose through negligence in its government, and the prison was established, and regulations for its government made, and its keepers appointed, by the city under statutory authority.

ERROR by plaintiff to El Paso county district court. *Affirmed.*

*Scott Ashton*, for plaintiff in error.

*Daniel A. Ferguson* and *Albert S. Frost*, for defendant in error.

BISSELL, P. J. This is measurably, if not wholly, a case of first impression in this jurisdiction. I am quite clear that professional opinion generally would, at first blush, concur with my original impressions of municipal responsibility in this class of cases. The whole trend, and almost the entirety, of adjudication is against it. The object of the action is to compel the city of Victor to respond in damages for injuries received by the plaintiff through the alleged negligent acts of the city authorities. The case comes up on error to a judgment rendered on demurrer, and the cause of action is

*See Gray *v.* Mayor, etc., of Griffin (Ga.), *ante*, 149, and *foot-note*.

deducible only from the pleading, wherefrom it appears McAuliffe had been arrested by a police officer for a violation of an ordinance of the town, and locked up in the calaboose. Later another violater of an ordinance was arrested, and put into a cell quite a distance from the apartment in which McAuliffe had been confined. As near as we can gather from the pleading, several persons were confined where McAuliffe was, though the drunken man was put into an independent cell. The intoxicated person, in some way undisclosed, set fire to his bedding, which communicated with the building, and the fire spread to the apartment where the plaintiff had been put. It is charged that there was no water by which they could put the fire out, and that nobody was around to look after the calaboose, and McAuliffe was, as he alleges, severely burned, and very much injured by the smoke which he inhaled; and the result of all these things was a very substantial injury to his person and to his health. For this he brings suit.

Negligence, of course, is the gist of this, as of all other actions in tort against cities. We must presume, for the purposes of the decision, that the plaintiff sustained the injuries of which he complains, because, if the city can ever be held in cases of this sort, the plaintiff stated enough to enable him to maintain his suit. If the action was against the county, or against the state, an unbroken current of authority would deny his right to recover. Counsel—as have the courts in one or two cases—attempt to draw a distinction between suits against cities and actions against a state or a county as a part of the sovereignty which are not held to be liable because of the negligence of the agents, and this on the general hypothesis that municipalities are not parts of the governmental organization, but are organized and exist solely and wholly for the benefit of the inhabitants within its boundaries, and the powers conferred are granted for their benefit; and when they attempt to exercise these powers they are held to a somewhat strict accountability for the due performance of the extraordinary authority which statutes

generally give cities. Courts have gone a long way in holding cities liable for the negligent acts of their agents, and they are always holden wherever the acts which are being done, or attempted to be done, or permitted to be done, are acts for the benefit, as perhaps it may be permissible to say, of the individuals who are inhabitants of the municipality. It is on this general principle that a city is held liable for the care of its streets and sidewalks, for negligence or carelessness in the construction of its sewers and drains, and probably as to sewers wherever there is a defect in the original plan of which they ought to be advised, though they are not liable for defective judgment, or for insufficiency in size. This general statement shows, in the main, the course and general results of adjudication on this subject. Whenever we approach the other field, which only concerns the exercise by the municipality of the judicial or governmental authority which may have been the subject of power granted, we find the cases almost universally hold cities are not liable for injuries resulting from negligent acts. The cases proceed on the hypothesis that acts of this nature are for the benefit of the public as well as of particular citizens, and that they are done in a public capacity, and, since a city is really one of the political subdivisions of the state, the city is not responsible for the negligent performance of such public duties. We are cited to quite a number of cases of a character precisely similar to this in which the city has been acquitted of liability, and to others of an analogous character which support these decisions. La Clef *v.* City of Concordia, 41 Kan. 323, 21 Pac. 272; Hill *v.* City of Boston, 122 Mass. 344; Brown's Adm'r *v.* Town of Guyandotte, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 299; Davis *v.* Knoxville, 90 Tenn. 599, 18 S. W. 254; Pollock's Adm'r *v.* Louisville, 13 Bush 221; Mendel *v.* City of Wheeling, 28 W. Va. 233; City of Richmond *v.* Long's Adm'rs, 17 Grat. 375; Corning *v.* City of Saginaw, 116 Mich. 74, 74 N. W. 307, 40 L. R. A. 526; White *v.* Board, 129 Ind. 396, 28 N. E. 846. We are only cited to the decisions of one state—North Carolina—

wherein a different doctrine has been announced. The principal case in the state is Moffat *v.* Asheville, 103 N. C. 237, 9 S. E. 695. We cannot regard it, however, as one which at all assails the doctrine of the cases which we have cited, or which lays down a different rule regarded as one of general law. Therein the city was held liable for a failure to properly maintain a jail, and for injuries which the plaintiff had sustained because of neglect. The liability of the city is put on the precise ground that the constitution and the statutes laid a specific duty on the municipality, and a breach of it would, because of the character, nature, and terms of the legislation, make the city liable. The court broadly declared the city would have incurred no liability, in any view of the case, but for the express provisions of the constitution and the law. By the constitution the lawmakers are required to provide for the structure and superintendence of the penal institutions of the state, including city police prisons, to secure the health and comfort of the prisoners, etc. The statute provided that the keeper of the jail should observe certain requirements in the management of the prison, and provide attendants for the safety of the prisoners. Even under a constitutional provision and legislation of this specific character the court went so far as to intimate that, if the city authorities built a reasonably suitable prison, and furnished attendants to look after the health and comfort of prisoners, they would not be liable for the neglect of the jail or the negligence of the attendants. It is quite true this was but an intimation of the court, and the question was left open as unnecessary to the decision. The whole course and reasoning of the opinion is in support of the general rule that cities are not liable for the performance of these governmental duties, or for the negligence of the agents who may be selected for the purpose, when the statute which grants the power does not enjoin its exercise in a particular manner. It is argued in the present case that under the general statute cities are given authority to establish places of confinement like calabooses, and are authorized to make rules and regu-

lations for their government, and to appoint keepers. This is undoubtedly a granting of specific power to establish such places, and gives the city government full authority to provide for the maintenance and care and government of places of confinement, as well as the right to appoint keepers and assistants. It is, however, a grant of authority without a specific limitation in the grant that it shall only be exercised in case these things are done; in other words, it seems to be a general grant of power to establish the place, and do whatever may be regarded by the government as requisite for proper maintenance, support, and regulation. We are unable to see that legislation of this sort at all resembles that in North Carolina, and compels the application of the rule which that state has established. That court in direct terms held: "Where a city or a town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging the duty imposed solely for the benefit of the public, it incurs no liability upon the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence." It will be observed from the tenor and terms of this quotation the court recognizes the general rule which we have announced, and only holds the case under consideration as without its operation because of the peculiar legislation in that state. It may be a little difficult, and I confess I had some trouble, to recognize the force of the exception established by the cases. If the question was an open one, I might be inclined to hold the city responsible. The whole current, and in fact the almost unanimous decision, of the courts on the question forecloses our judgment, and compels us to exonerate the municipality, and affirm the judgment entered on the demurrer. Affirmed.

## CITY COUNCIL OF GREENVILLE

*v.*

## KEMMIS.

(*Supreme Court of South Carolina, Aug. 7, 1900.*)

**Gaming—Whether Statutory Offense Enlarged by Ordinance.**—The contention that the ordinance in question was unconstitutional and invalid, because it enlarged the offense of keeping a gaming house as already defined by statute in making it a penal offense for a person to permit his private room to be used as a place for gaming, was without merit.

**Same—Same.**—The fact that a criminal statute prohibits gaming in a public place does not render unconstitutional and invalid, as enlarging an offense already defined by the legislature, a city ordinance making it a penal offense for a person to permit his private room to be used as a place for gaming, where the city council is authorized by charter to pass all such ordinances "as shall appear to them necessary and requisite for the security, welfare and convenience of said city," and to fix and impose fines and penalties for their violation.

**Same—Penal Ordinance—City's Authority under Charter General Welfare Clause.**—A municipal corporation, under the general welfare clause of its charter, has authority to make it a penal offense for a person to permit his room in a building formerly used as a hotel, which he rents and occupies, to be used as a place for gaming with cards, although the legislature has not made gaming under such circumstances an offense.

**Same—Same—"House"—Definition.**—Such a room is the "house" of the person so occupying it, within the meaning of such an ordinance.

**Same—Same—Amount of Fine—Discretion of Mayor.**—Where the fine imposed for the violation of such an ordinance is within the limits prescribed both by charter and the ordinance, the action of the mayor in fixing its amount is not subject to review.

APPEAL by defendant from Greenville county common pleas circuit court. *Affirmed.*

City Council of Greenville *v.* Kemmis

Defendant appealed on the following grounds: "(1) That his honor erred in confirming the decision of the mayor in finding the defendant guilty, when there was no testimony to show that the alleged gaming took place in a house, place, or inclosure belonging to defendant, or in a place used for gaming, or that there was any evidence of any gaming on the day of arrest, when defendant had no notice of the charge that gaming had taken place on another day. (2) His honor erred in confirming the finding of the mayor in finding the defendant guilty of keeping a gaming house, when the testimony, even if competent, showed no more than that defendant had engaged in a single game of cards, which did not constitute the offense charged. (3) His honor erred in confirming the judgment of the mayor, when he should have held that the maximum fine allowed by ordinance was in this case excessive and unjust. (4) His honor erred in confirming the decision and judgment of the mayor, when he should have held that as defendant was not guilty of the charge under the laws of South Carolina, which laws have defined gaming houses, and defendant not being the keeper of a public house as defined by the said laws of the state, defendant could not be guilty under an ordinance which enlarges the offense beyond the limit set by the legislature. (5) Because his honor erred in holding that the city ordinance under which the defendant was convicted was constitutional and valid, and that the mayor had jurisdiction of an offense created by said ordinance, when his honor should have held that the ordinance was void, inoperative, and unconstitutional, and the mayor had no jurisdiction of the offense created thereby; and his honor should have held that when the law of gaming is defined, and the punishment prescribed, by the laws of the state, a municipal corporation is not authorized to suppress any gaming not prohibited by said state laws, but it is confined to the use of such means as may be within its power to enforce within its limits the law as defined and specifically laid down by the legislature."

City Council of Greenville *v.* Kemmis

*W. G. Sirrine*, for appellant.

*B. A. Morgan*, for respondent.

McIver, C. J. The defendant was tried and convicted before the mayor's court for the city of Greenville for a violation of one of the ordinances of said city, and sentenced to pay a fine of $50, or be imprisoned for the term of 30 days. He paid the fine under protest, and gave notice of appeal to the circuit court,—upon what grounds does not appear in the "case." That appeal was heard by his honor, Judge Watts, who passed the following order dismissing the appeal: "The above-stated case came up before me for hearing upon appeal from the mayor's court of the city of Greenville upon exceptions stated, matter written and oral; the oral being as to matters jurisdictional. Upon hearing said case upon said appeal, and after the argument of appellant's counsel, it is ordered that the exceptions or grounds of appeal be overruled, the appeal dismissed, and the judgment of the court below confirmed." From this order the defendant has appealed to this court upon the several grounds set out in the record, which will be incorporated by the reporter in his report of this case. So far as these grounds raise any question of fact, they may be passed by with the simple remark that this court has no jurisdiction to review decisions of questions of fact in such a case as this. We do not, therefore, propose to consider these grounds seriatim, but will confine our attention to the questions discussed in the argument of counsel for appellant.

The first point made is thus stated in the argument for appellant: "The ordinance is unconstitutional and invalid because it enlarges the offense of keeping a gaming house as already defined by the law of the state." The first remark we have to make in regard to this point is that it seems to have been made under a misapprehension of the true nature of the case. It assumes that the offense with which appellant was charged, and of which he was convicted, was "keeping a gaming

Gaming—Whether Statutory Offense Enlarged by Ordinance.

house," whereas the "case" shows that "the charge upon which defendant was tried was permitting his place, house, or room to be used as a place for gaming with cards for money or other stakes," in violation of one of the ordinances of the city, set out in the "case," the terms of which will hereinafter be more particularly referred to. And the mayor, in his return, which is set out in the "case," states the offense charged in the same language. The mayor nowhere says what he is quoted by counsel for appellant as saying,—that the charge was "for keeping a gambling house." So that the first point made by appellant cannot, for this reason, be sustained. But as we understand from the argument that the real ground taken by appellant is that inasmuch as the state has, by section 391 of the criminal statutes, undertaken to legislate upon the subject of gaming, and after making it a penal offense for any person to play "at any tavern, inn, store for the retailing of spirituous liquors, or in any house used as a place for gaming, or in any barn, kitchen, stable, or other outhouse, or in any street, highway, open wood, racefield, or open place, at any game or games with cards or dice," etc., and making it the duty of any trial justice (now magistrate) to prosecute such offenders, also made it his duty to prosecute "the keeper or keepers of taverns, inns, stores for the retailing of spirituous liquors, public places, or house used as a place for gaming or other public house," and declared "that every person so keeping such tavern, inn, retail store, public house, or house used as a place for gaming, or such other public house," shall, upon conviction, be imprisoned, etc., showing that the offenses thus denounced must be committed in some public place, it is not competent for the municipal corporation of the city of Greenville to pass an ordinance going beyond this, and making it a penal offense for a person to permit his private room in the city of Greenville to be used as a place for gaming. In the first place, it may be questioned whether the statute referred to is confined to those who have done any of the acts therein

forbidden in a public place. Certainly the acts denounced as criminal offenses in the succeeding section (392), are not confined to those done in some public place. But, waiving this, we think that, even if the criminal statutes referred to can be so construed as to relate only to acts done in some public place, still there is no reason why this alone can be regarded as sufficient to prevent the municipal corporation of the city of Greenville from passing the ordinance under which appellant has been convicted. It is quite true that a municipal corporation derives all of its powers from its charter, and can exercise no power which is not therein granted, either expressly or by necessary implication. But by the act to charter the city of Greenville (Acts 1885; 19 St. at Large, 109) the city council of Greenville is expressly vested with full power and authority to pass all such ordinances "as shall appear to them necessary and requisite for the security, welfare and convenience of said city, for preserving health, life and property therein, and securing the peace and good government of the same, and may fix and impose fines and penalties for the violation thereof: provided, nevertheless, that * * * no fine shall exceed the sum of fifty dollars, or imprisonment extend for a period longer than thirty days, or either, or both, for the same offense." In pursuance of this authority the city council passed the ordinance here in question, entitled "An ordinance to prevent the pernicious practice of, and engaging in, gaming for money within the city of Greenville, S. C.," one of the provisions of which is that "it shall not be lawful for any person or persons to * * * permit his, her or their enclosure or place or house to be used as a place for gaming with cards * * * for money or other stake"; and the punishment to be imposed for such offense is a fine not exceeding $50, or imprisonment for not more than 30 days.

Same—Same.

It was admitted at the trial that the room in which the offense was alleged to have been committed was occupied by

the defendant; it being a furnished room in the building known as the "Central Hotel," rented by defendant. There was testimony tending to show that when the sergeant of police entered the room he found the defendant sitting at the head of the table, on which there were three packs of cards, and a pack of poker chips near the defendant, and in the bureau drawer the sergeant found a quantity of poker chips. On the right of the defendant two other persons were sitting, one of whom had money in his hands. There was also testimony that on a previous occasion persons were seen playing cards in that room, for money, in the presence of the defendant. The contention on the part of the appellant is that this was a private room occupied by defendant, and that, inasmuch as the lawmaking power of the state had not seen fit to make it a criminal offense for a person to permit his private room to be used as a place for gaming with cards for money, the city council had no authority to do so. Granting, for the sake of argument only, that the legislature has not seen fit to make it a criminal offense for a person to permit his room in a building formerly used as a hotel, which he rents and occupies, to be used as a place for gaming with cards, we see no reason whatever why that should operate as a prohibition to the city council from passing such an ordinance as that here in question. Common experience shows that city corporations find it necessary, for the peace and good order of the city, to forbid the doing of many acts, under penalty, as to which the legislature has not found it necessary to legislate. The ordinance is certainly not in conflict with any act of the legislature. The state legislation upon the subject, even if construed as contended for by appellant, and the municipal legislation here in question, can both stand together, and there is no conflict whatever. The utmost that can be said is that the municipal corporation, under the authority vested in it by its charter, has seen fit to make an act done within the corporate limits a criminal offense, which the legislature has not seen fit to constitute such an offense.

Same—Penal Ordinance—City's Authority under Charter General Welfare Clause.

Indeed, it is well settled in this state, at least, that the same act may be made an offense both against the state and the municipal law. As that great jurist, JUDGE COOLEY, expresses it in his work on Constitutional Limitations, at page 199 of the second edition: "Indeed, the same act may constitute an offense both against the state and the municipal corporation, and both may punish it without violation of any constitutional principle." And in a note he says, "Such is the clear weight of authority, though the decisions are not uniform," and proceeds to cite the cases. In one of the cases which he cites (Rogers *v.* Jones, 1 Wend. 261), we find the following language, which is so appropriate to the case in hand that we quote it: "If the legislature have passed a law regulating as to certain things in a city, I apprehend the corporation are not thereby restricted from making further regulations." To the authorities cited by this distinguished author we may add the case of Cross *v.* North Carolina, 132 U. S. 132, 10 Sup. Ct. 47, 33 L. Ed. 287, especially at page 139, 132 U. S., page 49, 10 Sup. Ct., and page 290, 33 L. Ed., decided since JUDGE COOLEY wrote. This doctrine has been expressly recognized and approved in this state (see State *v.* Williams, 11 S. C. 288, and the cases therein cited), and has again been approved in the comparatively recent case of City Council *v.* O'Donnell, 29 S. C. 368, 369, 7 S. E. 528, 529, 1 L. R. A. 636, 637. If this be so, then it is clear that even though the legislature may have passed a statute in reference to the offense against the state of gaming, the municipal corporation of Greenville is not thereby restricted from making further regulations upon the same subject, which, of course, have no operation except within the corporate limits of Greenville. See, also, the cases of City Council *v.* Heisembrittle, 2 McMul. 233, and City Council *v.* Aherns, 4 Strob. 241. The case of Heise *v.* Town Council, 6 Rich. Law 404, cited by counsel for appellant, has no application to this case. There the case turned upon the fact that the town council had no power, under its charter, to impose a forfeiture as a

penalty for a violation of its ordinances. Here, however, the city council of Greenville are expressly invested by its charter with the power to pass such ordinances as shall appear to them necessary for securing the peace and good government of the said city; and, if we were at liberty to inquire into the propriety of the means which they saw fit to adopt to suppress the pernicious vice of gaming, we would be inclined to agree with them that in order to effect the laudable purpose a very efficient means would be that which they adopted, for if persons who rent furnished rooms for lodging in a city like Greenville are permitted, with impunity, to use their rooms as places for gaming, the vice would flourish, even if every public gaming house in the city were entirely suppressed. We are satisfied, therefore, that appellant's first position cannot be sustained.

The second point made by counsel for appellant is thus stated in his argument: "Even if the ordinance is valid, the defendant is not guilty of the offense charged." This point, as developed by the argument, seems to rest, first, upon the theory that the charge made against defendant was "keeping a gambling house," which, as we have shown above, was not the charge made against the defendant, and therefore more need not be said as to that. The real ground, however, upon which this second point made by appellant seems to rest, is that the room which it is alleged the defendant permitted other persons to use as a place for gaming was neither his "inclosure," nor "place," nor "house," and, as the ordinance used those terms in describing the offense denounced, he could not legally be convicted. This is quite technical, but still defendant has a right to make the point, and it must be considered. But the question is whether the point is well taken. We do not think so, for two reasons: (1) The room which defendant rented and occupied was certainly his "place" as long as he continued to occupy it. He could lawfully forbid any person who was objectionable to him from entering his room or "place" of abode. Even his landlord had no right to enter

Same—Same—"House"—Definition.

upon it without the consent of the tenant, except under circumstances not necessary to be stated here. It was his castle, as much as the poor man's hut in the wilderness. But (2) we have very high authority for saying that the room was his "house." See 2 Bish. Cr. Law, §§ 107, 108. And as was said by O'NEALL, J., in State *v.* McDowell, Dud., at page 347, in speaking of bawdy houses: "Without concert between defendants occupying different rooms for purposes of prostitution in a lodging house, the offenses are just as distinct as when they occupy different houses; for, in the case supposed, each room is a bawdy house and its inmate the keeper." The second point cannot, therefore, be sustained.

The third and last point made is that the fine imposed "was excessive and unjust." It certainly was within the limits prescribed both by the charter and the ordinance, and therefore there was no error of law in imposing a fine within those limits. This being so, the amount of the fine was a matter exclusively within the discretion of the mayor, and in his return he gives a very good reason for going to the limit of the law in this instance, as he had found that the imposition of a smaller fine had proved to be inefficacious in suppressing the evil. The judgment of this court is that the order or judgment of the circuit court be affirmed.

Same—Same—Amount of Fine—Discretion of Mayor.

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WABASKA ELECTRIC CO.

*v.*

CITY OF WYMORE.

(*Supreme Court of Nebraska, May 2, 1900.*)

**Pleading.**—A pleading should state facts, and not mere conclusions.

**Same—Injunction.**—A petition for an injunction should disclose with definiteness and particularity the threatened injury which the court is asked to restrain the defendant from committing.

Wabaska Electric Co. *v.* City of Wymore

**Breach of Contract—Injunction.**—An injunction will not lie to enjoin the breach of a contract, where the party complaining has a plain and adequate remedy at law.

**Electric Light Companies — Regulation of Rates — Municipal Powers.**—A city of the second class, having less than 5,000 inhabitants, has no authority to regulate the rates and charges which an electric light company may charge its customers for lights.

**Exceeding Legislative Powers—Liability for Acts of Municipal Officers.***—In attempting to legislate upon matters beyond its jurisdiction, the governing body of a city does not represent the city, and does not act as its agent, nor by color of its authority.

**Same—Same.**†—An action cannot be maintained against a city for an act done by its officers outside the actual and apparent scope of their authority.

**Same—Municipal Officers—Injunction.**‡—If the mayor and council of a city threaten to exceed their authority and adopt an ordinance which will be prejudicial to the rights of an individual, an injunction may, in a proper case, issue against them, but not against the city.

(Syllabus by the Court.)

ERROR by plaintiffs to Gage county district court. *Affirmed.*

*Hazlett & Jack*, for plaintiff in error.

*A. D. McCandless*, for defendant in error.

SULLIVAN, J. The Wabaska Electric Company commenced an action against the city of Wymore, alleging in its petition that the defendant is a city of the second class, having less than 5,000 inhabitants; that the plaintiff is the assignee and owner of a contract whereby it secured the exclusive privilege for 21 years to construct and operate in said city an electric light plant for the purpose of furnishing the city and its inhabitants with electric lights. It is further alleged: "(3) Plaintiff further says that the said city is endeavoring to harass the operations of said plaintiff by passing or proposing to pass ordinances which will deprive the plaintiff of the right to operate

Case Stated.

*See *note*, 3 Mun. Corp. Cas. 28 *et seq.*

†See generally, City of Omaha *v.* Croft (Neb.), 3 Mun. Corp. Cas. 172, and *note*, 182.

‡See note at end of case.

its plant in such a manner that the same shall be self-sustaining. (4) That the said defendant, by virtue of said ordinance, is under contract to locate and use six arc lights upon the streets of said city, and to pay monthly rental therefor of eight dollars ($8) per month for each light, which said plant was in successful operation, with the said lights, prior to said January 1, 1890. (5) Plaintiff further says that the defendants threaten to, and, unless restrained by the court, will, discontinue the use of said lights as provided by said ordinance, and further threaten to, and, unless restrained by this court, will, enact an ordinance governing the plaintiff's private contracts with its consumers, and establishing rates which will be wholly indequate for the service rendered. This plaintiff says he has no other adequate remedy at law, except in a court of equity." The prayer of the petitioner is that the defendant be enjoined from violating its contract, and from attempting to regulate plaintiff's charges for supplying its customers with lights. The court, on demurrer, decided that the facts stated did not constitute a cause of action, and gave judgment on the merits in favor of the defendant. The judgment is right, and must be affirmed.

The first allegation above quoted is the statement of a conclusion, and not the statement of a fact. The injunction provided by the Code "is a command to refrain from a particular act." The third paragraph of the petition does not show specifically the contemplated action which it is claimed will prevent the plaintiff from receiving just returns upon its investment. The threatened wrong is not pointed out with such definiteness and particularity as to justify the allowance of an injunction. In Blakeslee *v.* Railway Co., 43 Neb. 61, 61 N. W. 118, it is said, "The pleading in an action of injunction to obtain relief should set forth the particular act or acts from the doing or threatening to do which it is asked of the court to command the party to refrain." The averment that the defendant is

Pleading.

Same—Injunction.

threatening to discontinue the use of the six arc lights, for which it agreed to pay $48 per month, does not disclose any ground for equitable relief. The mere disuse of the lights would not, of itself, be prejudicial to the company; and it is not alleged that the city intends to withhold payment of the monthly installments, in violation of its contract. But, if a breach of the agreement in this particular were contemplated, an injunction would not be granted; for there is in such case a plain and adequate remedy at law. Terry *v.* Starch Co., 43 Neb. 866, 62 N. W. 255; Carstens *v.* McDonald, 38 Neb. 858, 57 N. W. 757; Drummond *v.* Crane, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707.

Breach of Contract—Injunction.

There remains to be considered the fifth paragraph of the petition, wherein it is stated that the city intends to adopt an ordinance interfering with the plaintiff's private contracts, and reducing its rates and charges so low as to make the operation of the electric light plant unprofitable. In dealing with this feature of the case, it is not necessary to determine whether the city was authorized by its charter, as it existed in 1889, to grant to any person, company, or corporation an exclusive franchise for the erection and operation of an electric light plant. The plant has come into being; it is now established; and the owner thereof has the right to furnish light to its private customers on such terms as may be mutually satisfactory to the parties concerned. The defendant has plainly no power or authority to regulate the plaintiff's charges for lights furnished to the inhabitants of Wymore. The legislature has, of course, the right to fix the price at which gas or electric lights shall be supplied by one who enjoys a monopoly of the business, by reason of having an exclusive franchise (Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Waterworks *v.* Schottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173), and such right may be delegated to the governing body of a public or municipal corporation. But the power of regulating the charges for electric lights is not

Electric Light Companies—Regulation of Rates—Municipal Powers.

found among the grant of powers contained in defendant's charter. There is no such authority given, either expressly or by implication, and therefore it does not exist. Lewisville Natural Gas Co. *v.* State, 135 Ind. 49, 34 N. E. 702, 21 L. R. A. 734; *In re* Pryor, 55 Kan. 724, 41 Pac. 958, 29 L. R. A. 398; City of St. Louis *v.* Bell Tel. Co., 96 Mo. 625, 10 S. W. 197, 2 L. R. A. 278; Spaulding *v.* City of Lowell, 23 Pick. 71. In the last-mentioned case, SHAW, C. J., speaking of municipal corporations, said: "They can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association." The adoption of the ordinance referred to in the fifth paragraph of the petition, being entirely beyond the power of the city authorities, and being an act which would, according to the showing of the plaintiff, result in irreparable injury, should doubtless be enjoined, if the proper parties were before the court. Davis *v.* Sturtevant, 9 N. Y. 263; People *v.* Dwyer, 90 N. Y. 402; Waterworks *v.* Bartlett (C. C.), 16 Fed. 615; Roberts *v.* City of Louisville, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844; High, Inj. § 1241. But the mayor and city council are not parties to this suit, and we do not understand that an action will ever lie against a city for an act done by one of its officers outside the scope of his authority.

Same—Same.

The mayor and council have power to enact ordinances, but that power is plainly limited by the law under which the city is organized. In attempting to legislate upon matters beyond its jurisdiction, the governing body of a city does not represent the city, and does not act as its agent, nor by color of its authority. It is like any other agent who transcends his authority, and it, and not its principal, must answer for the wrongful act done or threatened. If the authorities of Wymore are threatening to do an illegal act, obviously beyond the scope and milits of their agency, the injunction must go against them,

Exceeding Legislative Powers—Liability for Acts of Municipal Officers.

Same—Municipal Officers—Injunction.

Note

and not against the city. The judgment of the district court is affirmed. Affirmed.

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NOTE.

**Ordinances—Whether Passage Will Be Enjoined.**—The passage of an unauthorized ordinance will not be enjoined; and courts will not act until an attempt is made to enforce it. Chicago *v.* Evans, 24 Ill. 52; Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. Rep. 756; People *v.* Sturtevant, 9 N. Y. 263; Moore *v.* Hoffman, 2 Cin. (Ohio) 453; Smith *v.* McCarthy, 56 Pa. St. 359.

In Des Moines Gas Co. *v.* Des Moines, *supra*, an action to enjoin the passage of an ordinance annulling an alleged contract with the city granting plaintiff the exclusive right to lay gas pipes and light the streets and conferring a like franchise upon another company, the court, in delivering the opinion, said: "Had the ordinance under which the plaintiff claims been enacted by the General Assembly, and the plaintiff acquired thereunder the same rights as under the ordinance, and the General Assembly thereafter attempted to enact a law in substance like the ordinance sought to be enjoined, could the judiciary interfere and by injunction restrain the action of the General Assembly on the ground that the law, if enacted, would 'impair the obligation of contracts?' After its passage the judiciary may declare the law unconstitutional. Piqua Bank *v.* Knoop, 16 How. 369; Dodge *v.* Woolsey, 18 *Id.* 331, but previous to that time judicial powers cannot be invoked.

"Dodge *v.* Woolsey clearly demonstrates that the interference of the judiciary is unnecessary to protect the rights of the plaintiff.

"If the ordinance sought to be enjoined is void, by reason of its unconstitutionality, the plaintiff can be in nowise injured by its passage. A void law is no law, and this without doubt is true as to an ordinance. No injury, much less one of an irreparable character, can be inflicted by such an ordinance.

"The fact that the ordinance sought to be enjoined amounts to a contract with another gas company by no means deprives it of its legislative character. These corporations must be permitted to promote the welfare of the inhabitants thereof in their own way, so far as the form their respective ordinances shall assume is concerned.

"Suppose the city had determined to put in gas works, to be owned and controlled by the city, and thereby supply the public lamps and buildings with gas, and by ordinance so provided; could such an ordinance be enjoined, or would this have been rightful legislation?

and because the city chose by ordinance to contract with some one to do the same thing, does that make it wrongful?

"No such distinction can be drawn. The substantial thing of which the plaintiff complains is that it is about to be deprived of the benefits of the contract, and not as to the form in which the attempt is to be made.

"The only cases cited by counsel for the plaintiff, which apparently conflict with the views herein expressed, are The People *v.* Sturtevant, 9 N. Y. 263, and Davis *v.* The Mayor, 14 *Id.* 506. The former grew out of and is based on the latter. In the latter the power to enjoin a city council from by ordinance creating a public nuisance in the streets was affirmed. It is unnecessary to commit ourselves to this doctrine. There is, however, a clear distinction between the case cited and the one at bar. For it never can be a rightful subject of legislation to create a public nuisance, and if the passage of an ordinance, without more, created the nuisance, the mischief resulting therefrom might be irreparable, and we are not prepared to say its passage could not be enjoined.

"While it is not the province of the judiciary to interfere and arrest the passage of the ordinance, yet the doors of the courts are open for the purpose of testing its legality, and therefore the plaintiff is by no means remediless."

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JAMES

*v.*

CITY OF SEATTLE *et al.*

(*Supreme Court of Washington, July 14, 1900.*)

**City Council—Authority to Send Committee to Other Municipalities for Information.***—The fact that a city council has control of the subject of waterworks, street paving, street lighting, terminal facilities, etc., does not empower it to send, at the city's expense, a committee consisting of its members and other municipal officers to visit other municipalities for the purpose of acquiring information relating to such matters; and no expenditure of municipal funds can be made without express authority, or authority necessarily implied from a power conferred.

**City Comptroller—Unauthorized Claims—Refusal to Countersign Warrant.**—Where a city council is without power to authorize the payment of a claim, the city comptroller cannot be compelled to countersign the warrant directing the payment of such claim.

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*See note at end of case.

James *v.* City of Seattle

APPEAL by relator from King county superior court. *Affirmed.*

*John K. Brown*, for appellant.
*W. E. Humphrey* and *Edward Von Tobel*, for respondents.

REAVIS, J. In October, 1898, the city council of Seattle passed an ordinance providing "that a special committee consisting of the whole membership of the city council, or so many members as may be able to serve, and such executive officers as may be chosen by the city council, be and hereby are appointed to visit the cities of Duluth, West Superior, St. Paul and Minneapolis, Minn., Great Falls, Mont., Spokane, Wash., and such other cities as may be deemed advisable by said committee for the purpose of securing information upon the matters referred to in the preamble of this ordinance." The matters referred to in the preamble were "waterworks, street paving, street lighting, terminal facilities and other municipal matters which are now and constantly will be coming before the legislative and executive departments for consideration." The appellant, with other members of the city council and some other city officers, in October, 1898, visited St. Paul, Minneapolis, Duluth, West Superior, and Spokane, for the purpose of investigating and securing information concerning the matters mentioned in the preamble of the ordinance, and made necessary expenditures for his transportation, board, and lodging. In November, 1898, he filed with the secretary of the auditing committee his claim against the city for such expenditures. The claim was duly and regularly audited, reported to the council and approved, and an ordinance adopted directing a warrant to be drawn for appellant's claim, with others, and appropriating money from the general fund to pay the same. The warrant was drawn in appellant's favor for the amount, and signed by the mayor. But the respondent Parry, city comptroller, refused to countersign the same, and the defendant city refused to deliver the warrant to appellant. The suit was brought to procure a peremptory

Case Stated.

writ of mandate to compel the respondent Parry, as city comptroller, to countersign and to compel the city to deliver to plaintiff the warrant. The respondent demurred to the affidavit for the writ on the ground that it does not state facts sufficient to constitute a cause of action, or to entitle plaintiff to the relief therein prayed for. The demurrer was sustained, and the appeal is from the order sustaining the demurrer, and the judgment entered in favor of respondents.

It is urged here by counsel for appellant that the comptroller is a ministerial officer, and has no discretion in the discharge of his duties. The city charter provides that he shall countersign all warrants upon the treasury. Several authorities are cited to support appellant's contention. The case chiefly relied upon is that of McConoughey v. Jackson, 101 Cal. 265, 35 Pac. 863. In that case the plaintiff applied for a writ to compel the city clerk to issue a warrant for a claim for expenses incurred by him in procuring, at the request of the city, through the trustees thereof, counsel and legal services for the city. The bill was approved by the trustees and ordered paid. One of the defenses set up by the clerk was a denial of the indebtedness. With reference to this the court observed: "The law has not constituted the clerk either the guardian of the board of trustees, or an appellate court to pass upon the facts once decided by the board. The claim was one which the board of trustees had jurisdiction to hear and determine. Such determination was a judicial act, and involved a determination of the fact of indebtedness; and when so determined, whether right or wrong, its action was binding upon the clerk." Counsel maintains that the subject of waterworks, street paving, street lighting, terminal facilities, and other municipal matters comes within the control of the city council, and that members of the council are bound to use their best endeavors in behalf of the taxpayers, by giving them the best results in the most economical manner, and that it is the duty of councilmen to inform themselves concerning all matters which come

City Council—Authority to Send Committee to Other Municipalities for Information.

before them, that they may act intelligently for the benefit of the city. It is true, the members of the city council owe the public duty to the city to exercise their best faculties in its interest. The compensation of a member for his official duties as councilman may be determined and fixed, and cannot be changed during his incumbency of office. If the members of the council, upon their tour of inspection, were in the discharge of their official duties, the restriction upon additional compensation applies. Tacoma *v.* Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372. The only ground, then, upon which compensation could be sustained, would be that of necessary expenses incurred in the performance of official duties. Necessary expenses must be such as are strictly essential to municipal purposes. This principle is well established. 1 Dill. Mun. Corp. §§ 89–91; 19 Am. & Eng. Enc. Law, 541. JUDGE COOLEY, in his work on Taxation (page 209), observes: "In the construction of any grant of the power to tax made by the state to one of its municipalities, the rule which is accepted by all the authorities is that it should be with strictness. The reasonable presumption is held to be that the state has granted in clear and unmistakable terms all it has intended to grant at all, and, whatsoever authority the municipal officers assume to exercise, they must be able to show the warrant for in the words of the grant." And we think the rule thus announced is the established one, and in consonance with all sound authority The members of the city council are trustees. The body holds a trust for the inhabitants of the city. The terms of the trust are fixed by legislation, and no expenditure of money belonging to the city can be made without express authority, or implied authority by reason of a necessary granted power. Where this authority does not exist, the council is without power to authorize the payment of the claim against the city; and, upon sound principle, it cannot be conceded that the council had the power to authorize the payment of the claim of appellant. To the objection that the comptroller cannot defend against the suit, it is sufficient

City Comptroller—Unauthorized Claims—Refusal to Countersign Warrant.

answer that the other principle has been established by this court. Chalk *v.* White, 4 Wash. 156, 29 Pac. 979. Where the council is without power to authorize the payment of the claim, the officer may properly refuse to countersign the warrant directing the payment of such claim. The judgment is affirmed.

DUNBAR, C. J., and FULLERTON, J., concur. ANDERS, J., not sitting.

NOTE.

**Appropriation of Municipal Funds—Expenses of Committee Sent to Municipal Convention.**— In Waters *v.* Bouvouloir, 172 Mass. 286, 52 N. E. Rep. 500, it was held that a committee to represent the city of Holyoke at the convention of American Municipalities could not be sent at the city's expense, as such use of municipal funds would not be for a public purpose within the meaning of the city's charter, or the general laws of the state relating to municipal corporations.

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## BUSH

*v.*

## O'BRIEN *et al.*

(*Court of Appeals of New York, Oct. 2, 1900.*)

**City Attorneys—Offer of Judgment—Authority to Bind City.**— An attorney employed by an individual has no authority by virtue of his retainer to make or accept an offer of judgment, and a city attorney or corporation counsel, unless they are conferred by charter, has no larger powers, by virtue of his office, to bind the municipality than those connected with the ordinary relations of attorney and client.

**Same—Same—Same—Construction of Charter.**—The charter of the city of New York does not invest the corporation counsel with any other or greater power, with respect to offering or accepting judgment, than that of an attorney employed by an individual to take charge of his legal business.

**Same—Same—Same—Questions Involved.**—The contention that the question discussed in the case at bar as to the power of the corporation counsel to confess or make offer of judgment against the

city was purely academic, so far as the Court of Appeals was concerned, for the reason that the legislature had enacted that he should not have such power, was without merit, as it appeared that the judgment in question was entered before the legislature took action in the matter.

Same—Same—Same—Actions by Taxpayers.*—Under a statutory provision authorizing a taxpayer of a municipal corporation to bring actions to prevent official illegal acts, a taxpayer of a city may maintain an action to prevent the collection or payment of judgments against the city confessed by the corporation counsel without authority.

APPEAL by plaintiff from First department appellate division supreme court. *Reversed.*

*Frederic R. Kellogg*, for appellant.

*L. Laflin Kellogg*, for respondents.

HAIGHT, J. The defendants O'Brien, Clark, and Brown interposed a demurrer to the plaintiff's complaint upon the ground that it does not state facts sufficient to constitute a cause of action; and the question certified is, does the complaint state sufficient facts, etc.? The action was brought by the plaintiff, as a taxpayer of the city of New York, to restrain the demurring defendants from collecting, and the comptroller of the city from paying, certain judgments which the demurring defendants had obtained against the city of New York, amounting in the aggregate to $700,000. The complaint alleges that these judgments were obtained and entered upon offers executed and verified by the corporation counsel, and accepted by the demurring defendants. The complaint further alleges that the offers of the judgments made by the corporation counsel were not authorized by the comptroller, the mayor, or by the aldermen and commonalty of the city; that the corporation counsel had no authority or power to make the offers; and that the judgments entered thereupon were illegal and void.

Case Stated.

The first, and to our minds the important, question raised for review relates to the power of the corporation counsel.

*As to right of taxpayer to contest an illegal disposition of municipal funds, see extensive *note*, 1 Mun. Corp. Cas. 142 *et seq.*

He appears to have made the offers to allow judgments to be entered in the actions then pending against the city, pursuant to the provisions of section 738 of the Code of Civil Procedure, which authorizes the defendant, before trial, to serve upon the plaintiff's attorney a written offer to allow judgment to be taken against him for a sum specified. Section 740 of the Code provides that "unless an offer or an acceptance made as prescribed in either of the last four sections is subscribed by the party making it, his attorney must subscribe it, and annex thereto his affidavit, to the effect, that he is duly authorized to make it, in behalf of the party." This provision of the Code appears to have been complied with, the corporation counsel verifying the offer made by him. The papers, therefore, upon which the judgments were entered all appear to be regular and upon their face show valid judgments. It is charged, however, in the complaint, that the corporation counsel in fact had no authority to make the offers, and consequently his affidavit to the effect that he was authorized was false. If the verification by the corporation counsel was false, it was an illegal act on his part, and the case is brought within the clear wording of the statute which authorizes a taxpayer to bring an action "to prevent any illegal official act" on the part of any officer of any county, town, village, or municipal corporation in the state. Laws 1892, c. 301. The question presented does not call for a review of a board of audit or of a board of assessors, or other judicial body who have passed upon the merits of a claim, such as was considered in the case of Osterhoudt *v.* Rigney, 98 N. Y. 222, and other kindred cases, but is limited to the question of power. If the corporation counsel had no authority to make the offers, he had no power to do so. If he had no power to make them, it, of necessity, follows that the judgments wer enot only irregular, but were unauthorized.

City Attorneys—Offer of Judgment—Authority to Bind City.

In the first place, as bearing upon the power of an attorney to make an offer of judgment, we have the very significant provisions of section 740 of the Code, above quoted. By its

provisions, if the offer is not signed by the party it must be by his attorney, and he must annex thereto his affidavit to the effect that he is authorized by the party to make the offer, thus indicating that the authority to make the offer must be other than that of the ordinary retainer by a party to prosecute or defend an action. If the attorney has the power to make or accept an offer of judgment by virtue of his retainer, then the provision of the Code requiring him to annex his affidavit is useless and unnecessary. But we think this question has been settled in this state, and that the Code but recognized the existing rule. In the case of Gaillard *v.* Smart, 6 Cow. 385, SAVAGE, C. J., delivered the opinion of the court, holding that while an attorney, by virtue of his retainer, had the power to discontinue an action, he had no power to release the cause of action. In Barrett *v.* Railroad Co., 45 N. Y. 628, 635, ALLEN, J., says: "The authority of the attorney does not extend to a compromise or release. He may discontinue an action, because that relates to the conduct of the suit, and is within his retainer, and not to the cause of action. An attorney cannot settle a suit, and conclude the client in relation to the subject in litigation, without his consent,"—citing Shaw *v.* Kidder, 2 How. Prac. 244; Lewis *v.* Gamage, 1 Pick. 347. In the case of Beers *v.* Hendrickson, 45 N. Y. 665, 669, GROVER, J., says: "An attorney is not authorized by his retainer to satisfy a judgment without payment, and if he does so the court will set such satisfaction aside." In Mandeville *v.* Reynolds, 68 N. Y. 528, 540, FOLGER, J., in delivering the opinion of the court, after referring to the ruling of the court below to the effect that the attorneys in the action had no power to compromise the judgment and release the defendant unless authority was expressly given to them by the plaintiff, says: "In holding thus, I think that the court was right. An attorney is not authorized by his retainer to satisfy a judgment without payment, and if he does so the satisfaction will be set aside. The authority of an attorney does not extend to a compromise or a release. He cannot settle a suit, and conclude his client

in relation to the subject in litigation, without consent of the latter." In Arthur *v.* Insurance Co., 78 N. Y. 462, it was held not to be within the scope of the authority of an attorney in an action to change the rights of his client, except so far as it may be done in the action. He cannot justify the commencement of another action, or create a cause of action against his client which did not before exist. In Lewis *v.* Duane, 141 N. Y. 302, 36 N. E. 322, it was held that an attorney employed to foreclose a mortgage has no implied authority in the matter to compromise the rights of his client, and make nugatory the duty he was employed to perform. There are numerous other cases, which might be cited, of the same import, but we think those referred to justify our previous assertion that the question has long been settled.

It is claimed, however, that the powers of a city attorney or corporation counsel differ from those of an attorney employed by an individual. They undoubtedly do, if the charters under which they are elected or appointed give to them greater or different powers, otherwise not. This question has also been considered by the courts. In the case of Mayor, etc., *v.* Taylor, 11 Abb. Prac. 66, it was held that the corporation counsel of the city of New York had no larger powers, as such, to bind his client, than those connected with the ordinary relations of attorney and client. And very recently, in the supreme court of the United States, in the case of Stone *v.* Bank, 174 U. S. 412, 423, 19 Sup. Ct. 747, 751, 43 L. Ed. 1028, 1032, PECKHAN, J., in delivering the opinion of the court, says: "We are also of the opinion that, as city attorney, he had no greater power to bind the city by that agreement than would an attorney have in the case of an individual." We are thus brought to a consideration of the charter of the city of New York. Section 255 creates a law department, the head of which shall be called the "Corporation Counsel," "who shall be the attorney and counsel for the city of New York, the mayor, the municipal assembly and each and every officer, board and department of said city."

Same—Same—Same—Construction of Charter.

It further provides that he shall "have charge and conduct of all the law business of the corporation and its department and boards, and all law business in which the city of New York is interested." There are other special powers given to him, with reference to the opening of the streets, etc., which have no bearing upon the question under consideration. If he has any power to settle and audit claims against the city, it must be found in the provisions of the charter quoted. A careful examination of these provisions fails to satisfy us that the legislature intended to invest the corporation counsel with any other or greater power than that of an attorney employed by an individual to take charge of his legal business. The charter also has created a finance department, of which the comptroller is the head, to whom has been given the express power "to settle and adjust all claims in favor of or against the corporation, and all accounts in which the corporation is concerned as debtor or creditor." Section 149. The power to settle and adjust therefore appears to have been vested in the comptroller, and not in the corporation counsel. This construction leaves each officer supreme in his own department. The comptroller determines whether a claim shall be compromised or not. If it is not compromised, the corporation counsel has the supreme power of determining the nature of the defense that shall be interposed to any action that shall be brought thereon, but not to compromise. If it had been intended to give the corporation counsel power to compromise claims rejected by the comptroller, without his knowledge or consent, then the corporation counsel would, in effect, become the superior of the comptroller, for all of the comptroller's determinations with reference to the audit of claims would be subject to review by the corporation counsel. Clearly this was not intended. It is claimed that we held otherwise in the case of O'Brien *v.* Mayor, etc., 160 N. Y. 691, 55 N. E. 1098. We do not so understand that decision. That case is reported below in 40 App. Div. 331, 57 N. Y. Supp. 1039. The facts, as stated in the opinion, are to the effect that the settle-

ment was made by the corporation counsel "with the assent, approval, or acquiescence first obtained of every municipal officer and department having to do with the subject, or having knowledge of the question involved, or who were competent to aid the city in reaching a conclusion as to whether it was wise to make a compromise, and for what amount." The question certified to this court in that case is as follows: "Had the counsel to the corporation, with the concurrence and upon the recommendation of the mayor, the comptroller, and the aqueduct commissioners, the chief engineer of the aqueduct commission, and the special counsel retained by the city in the particular case, power to offer to confess judgment against the defendants in an action brought to recover an amount claimed to be due to plaintiffs upon a contract made under chapter 490, Laws 1883, and where there was an actual controversy between the contractors [the plaintiffs in the action] and the defendants as to the amount due the plaintiffs under the said contract, for a sum of money very much less than that claimed by the plaintiffs in the action, and where the counsel to the corporation and the other public officials named, being all of the public officials who had any authority or power under the statute creating the aqueduct commissions, or under the other statutes in force at the time the offer was made in relation to the subject-matter of the contract, approve of the offer of judgment as a settlement of the controversy advantageous to the city of New York, and where, as a fact, such a settlement was advantageous to the city; the offer of judgment having been made and accepted by the plaintiffs and judgment entered thereon upon the 27th day of December, 1897?" The question was answered by us in the affirmative, and properly so; for in the question it distinctly appears that the compromise was made with the concurrence of the comptroller, etc. The appellate division appears to have entertained an impression that a taxpayer had the right to interpose and appeal in an action in which a person has obtained a judgment against the city on a claim for damages. We know of no such authority.

This is not an action in which the plaintiff is seeking to set aside an assessment against his own property, and thus remove a cloud therefrom, but it is brought under the statute to restrain an official illegal act.

It is contended that the question discussed as to the power of the corporation counsel to confess or make offer of judgment against the city is purely academic, so far as this court is concerned, for the reason that the legislature has enacted that he shall not have it. It appears, however, that the judgment in this case was entered, and, if report be true, numerous other transactions of a similar character took place, before the legislature took action in the matter. The act was local, having reference to the city of New York; and certainly the question cannot be academic in so far as it is involved in this case, or in other cases arising before the passage of the act, or in other cities of the state.

Same—Same—Same—Questions Involved.

It is also contended that a taxpayer cannot maintain an action to restrain the payment of a judgment against the city without showing that the city was not justly indebted in the amount stated in the judgment. If this be so, then a treasurer who is authorized by statute to pay out the money in his custody only upon a warrant of the comptroller, should he see fit to disregard the statute, and pay over the public moneys upon the order of any other officer, thus completely ignoring the comptroller, the taxpayers could not interfere to restrain his unlawful acts. The statute under which this action was brought authorizes a taxpayer to bring an action to prevent waste, and also to prevent an official illegal act. If the action was based upon the provision of the statute "to prevent waste," then it would be necessary to show that the city was not justly indebted in the amount stated in the judgment; for, if it was, there could be no waste. This action, however, was brought under the other provision of the statute,—to prevent an official illegal act. The act complained of, as we have seen, was a false affidavit made by the corporation counsel.

Same—Same—Same—Actions by Taxpayers.

He may have supposed that he had authority to make it, and intended no wrong. Still, if the allegations of the complaint are true, it was in fact false, and as such was a constructive fraud upon the public. The question certified should be answered in the affirmative, the interlocutory judgment reversed, and the demurrer overruled, with costs in all the courts, with leave to the defendants to answer in 20 days upon payment of the costs.

PARKER, C. J. (dissenting). The question whether the corporation counsel should, or not, have the power to confess judgments against the city, is purely an academic one, so far as this court is concerned, for the legislature has enacted that he shall not have it. Hence there is no excuse for straining in order to establish the same rule by decision, for the enactment of the legislature is as effective without as with a decision of this court. And yet such a holding is vigorously contended for, although its accomplishment would create a precedent hitherto unknown to our jurisprudence, *viz.* that a taxpayer may have a judgment against a city set aside in equity without showing that it was obtained through fraud or collusion, and without even questioning that the city was justly indebted in an amount stated in a judgment which was rendered by a court having jurisdiction of both the parties and the subject-matter. This the city cannot do, and no more can the taxpayer; for he acquires by the statute not greater powers than the municipal authorities, but the right to do what the latter may, but neglects or wrongfully refuses to, do. The purpose of the statute is to enable the taxpayer to prevent waste of the public funds, not to add to the public burdens by bringing suits to correct the pinholes in the procedure by which the rights of the city and its opposing ligitants are justly determined. So the foundation of any such cause of action must rest in the fact that the municipality is about to be compelled to pay that which it does not owe, and it must be pleaded. Here there is no such allegation, either in substance or effect; the complaint proceeding on the theory that it is one of the rights of a tax-

payer, under the statute, to have a judgment set aside for a mere irregularity. That it is an irregularity of which the plaintiff complains, and nothing more, is apparent on the very first attempt to analyze it. To speak of the judgment as being founded on an act which was without power may at first convey an impression to the mind that therefore it is void; but such effect can be but momentary, for the so-called lack of power is found to be, not in the court, which had jurisdiction of both the parties and the subject-matter, but in the officer who presumed to make and verify the offer of judgment. Some other officer than the corporation counsel should have made the admission, it is said,—to wit, the comptroller. The corporation counsel supposed he had authority, and made affidavit to that effect, so that the proceedings were, on their face, regular. Now, whenever it happens that judgments are entered on insufficient evidence, or without evidence, or on perjured evidence, or on admissions of counsel not authorized, the judgments are not void; they are only irregular. It is elementary law that where the court has jurisdiction of the subject-matter, and the parties are before it by due service of proper process, the jurisdiction is never ousted by the erroneous exercise of the power which it confers, which may be of such a character as to occasion reversal on appeal, or call for an order setting it aside on motion, but the judgment is not void. 1 Black, Judgm. 215, 244. The judgments in question were not entered on confession, but in actions in the supreme court wherein the court had acquired jurisdiction before the offer of judgment was made; and the judgment entered thereon was valid, although it be conceded that the corporation counsel had no right to make the affidavit without the direction of the comptroller. As it is a valid judgment, the taxpayer who seeks to set it aside must at least show merits. Independently of statute, it has always been the practice of our courts from the earliest times, in cases wherein the setting aside of a judgment for irregularity is sought, to require it to be shown that the judgment, as it stands, is unjust, and

the defense meritorious. This complaint shows nothing of the kind. It does not allege that the city has suffered or will sustain injury because of the entry of the judgment, nor is it even hinted in the complaint that the entry of the judgment was due to fraud or collusion. To have proved all the facts alleged in the complaint, therefore, would not have entitled the plaintiff to a judgment setting aside the judgment complained of, and hence the demurrer to it was properly sustained.

While concurring generally in the views expressed by JUDGE O'BRIEN, I desire, by this memorandum, to call special attention to a rule of universal application, the integrity of which is now threatened.

O'BRIEN, J. (dissenting). The plaintiff, as a taxpayer of the city of New York, brought this action against the city and the comptroller, in his official capacity, to restrain them from paying certain judgments recovered against the city by the other defendants, composing the firm of O'Brien & Clark and Brown, Howard & Co. All of the defendants interested in the judgments demurred to the complaint on the ground that it did not state a cause of action. The demurrer has been sustained in the courts below, and the only question involved in the appeal to this court is whether, upon the facts appearing on the face of the complaint, the plaintiff has any cause of action. The complaint contains the necessary averments to qualify the plaintiff as a taxpayer, and then states the following facts: (1) That the several defendants representing the firms named procured judgments to be entered in the supreme court on the 27th of December, 1897, for various sums, which are separately stated, amounting in the aggregate to $700,000. (2) That the judgments were entered upon claims arising out of the construction of the new aqueduct. (3) That said judgments were entered in actions in favor of the said firms and the members thereof against the city upon offers of judgment for the respective amounts stated in each case, executed and verified by the corporation counsel in behalf of the city, claiming to have authority in that

behalf; that the offers were accepted by the parties so bringing the actions, and upon such offers and acceptances the judgments were entered. (4) That the judgments were not entered by any other authority, and, upon information and belief, the corporation counsel had no power to make the offers, and that his acts in that respect are void. (5) That the parties procuring the judgments had demanded payment of the same from the comptroller, and had threatened to commence legal proceedings to collect and enforce the same, to the damage of the city and the waste of its estate. (6) It is averred, upon information and belief, that the corporation counsel has been requested to move in said actions to vacate the judgments upon the ground "hereinbefore stated," but that he has not done so, and the motion was based on other grounds, to the exclusion of the grounds "herein set forth," and that the motions were denied, and the order denying the same affirmed on appeal, and, upon information and belief, that the plaintiff has no other remedy at law or in equity to prevent the injury complained of. Then follows the demand for relief, to the effect that the several judgments be vacated, and that an injunction issue restraining the payment thereof.

It is believed that every material fact contained in the complaint is embraced in the foregoing statement. It is not alleged or claimed that there was any collusion, fraud, or bad faith in the transaction on the part of any one. It is not even alleged that the claims upon which the judgments were entered were infected with any vice whatever, or that they were not justly due to the claimants. The plaintiff's sole claim is not that the judgments, or any of them, are founded upon any illegal, fraudulent, or unjust demand, or that the creditors or the city officers who made the offer of judgment acted fraudulently or collusively, but that the judgments were not regularly entered, since the corporation counsel was without power to make the offer. The relief demanded is solely against an irregular judgment, and whether it is such or not is a matter of law, depending upon the power of the corporation counsel as an attorney and a public official.

There is no law that permits a taxpayer to interfere by action to vacate a judgment against a city solely on the ground of some irregularity in the procedure by which it was entered. For aught that appears in the complaint, the corporation counsel offered to allow judgment in an action against the city founded upon a just and valid claim, to which the city had no defense. When a party applies to the court to open a judgment by default, or to set it aside for irregularity, he is ordinarily required to furnish an affidavit of merits, and certainly no less should be required of a taxpayer who invokes the powers of a court of equity to vacate a judgment, not against himself, but the city of which he is a member. He should be required at least to allege that the judgment which he proposes to attack, or the claim upon which it is founded, is infected with fraud or illegality, or that the city has some meritorious defense to the same. The plaintiff's complaint is silent on all these points. It does not even show that the judgment was irregularly or improperly entered, but it does show just the contrary. It appears that the judgment was entered upon an offer by the corporation counsel, under the provisions of sections 738 and 740 of the Code. These provisions required the corporation counsel to prove to the court that he was authorized to make the offer, and the complaint alleges that he complied with the statute, since it is averred in substance that the offer was accompanied by the usual verification. Certainly the complaint does not aver a noncompliance with these provisions of law, and without the complaint the presumption is that the proper proof was made to authorize the entry of the judgment. So that the judgment described in the complaint is, upon its face, entirely regular; and the authority of the corporation counsel to make the offer, being mere matter of proof, is adjudicated by the judgment itself. What the plaintiff proposes now to do is to show in some way dehors the record itself that there was no authority to make the offer and thus to contradict it. The complaint avers, as we have seen, that the judgment was entered without authority, which is

not a fact, but a legal conclusion, and is so treated by the learned counsel for the plaintiff in his argument. Talcott *v.* City of Buffalo, 125 N. Y. 280, 26 N. E. 263; Institute *v.* Bitter, 87 N. Y. 250; Bogardus *v.* Insurance Co., 101 N. Y. 328, 4 N. E. 522. His contention is that the counsel to the corporation, though possessing all the powers of an attorney in an action, superadded to those conferred upon him by statute as a public officer, had no power to offer judgment in a pending action. The statute devolves upon him full charge of all the law business of the city, and designates him as an officer upon whom all legal process against the city may be served. Certainly the power to make the offer was not conferred upon any other officer, board, or body; and, if it was not possessed by the head of the law department of the city, it did not and could not exist at all. The duty imposed upon him exclusively to have charge of all the law business of the city necessarily involves the exercise of judgment and discretion, and embraces the power to offer judgment when, in his opinion, that course was for the best interest of the city. It is said that the power is liable to be abused, but so is every power conferred upon a public officer. The argument that power may be abused does not prove that the power does not exist, and the learned counsel for the plaintiff has failed to point out any other officer, department, or body, connected in any way with the city government, where the power could be more safely or properly lodged, or where it would be more likely to be exercised in the interests of the city.

But since this court has expressly affirmed the existence of this power in the corporation counsel, as we shall see hereafter, it is unnecessary to discuss this feature of the case upon principle, but it may be well to view it in another aspect. It is established law that a judgment cannot be attacked by a suit in equity on the ground that it was entered without authority, but the proceeding must be by motion in the action. Vilas *v.* Railroad Co., 123 N. Y. 440, 25 N. E. 941, 9 L. R. A. 844, and cases there cited. It appears on

the face of the complaint that the city did avail itself of that remedy through all the courts, and failed. The motion was made upon all the facts that appear in the complaint, with many others that do not appear. Not only was the question of authority involved in the motion, but the merits of the claims upon which the judgment is based, as well, and the motion was denied, and that order was affirmed in this court. O'Brien *v.* Mayor, etc., 40 App. Div. 331, 57 N. Y. Supp. 1039, affirmed in 160 N. Y. 691, 55 N. E. 1098. The plaintiff now proposes to take up the case where the city was compelled to leave it, and litigate the whole matter over again. Of course, if the plaintiff is not concluded by the decision against the city, made without collusion or fraud, then there is no reason why some other taxpayer may not take up the case, and litigate the whole matter again, should the plaintiff fail in this action, and thus the controversy would be continued indefinitely. The plaintiff, as a taxpayer, has no rights in this action, except such as are derived from some act of the city or its officers. The wrong, if any, is to the city, and not to the plaintiff personally. The position of the taxpayer in such an action is analogous to that of a stockholder in a private corporation seeking to impeach some corporate transaction. Whatever will bar or estop the city or the private corporation will bar or estop the taxpayer or the stockholder. Alexander *v.* Donohoe, 143 N. Y. 203, 38 N. E. 263. It cannot be doubted that the final order upon the application by the city to vacate the judgment in question concludes it, and is a bar to any other application for that purpose. A final order in such an application has the same effect as a judgment in an action. The city is precluded by the decision from raising any question involved or decided in that motion, or which could have been litigated or decided. These propositions are fully sustained by the authorities cited in the learned opinion below. Culross *v.* Gibbons, 130 N. Y. 447, 454, 29 N. E. 839; Ashton *v.* City of Rochester, 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334; Bell *v.* Merrifield, 109 N. Y. 202, 16 N. E. 55; Manufacturing Co. *v.* Walker, 114 N

Y. 7, 20 N. E. 625; Lorillard *v.* Clyde, 122 N. Y. 41, 25 N. E. 292; Barber *v.* Kendall, 158 N. Y. 401, 53 N. E. 1. The application to vacate, and the decision denying the same, appear upon the face of the plaintiff's complaint, and it follows that he is also concluded by the former adjudication. He cannot do what the city is estopped from doing. If he had alleged that the former proceeding was fraudulent or collusive, then the effect might be different, but he did not, and presumptively could not. It is said that this action is based upon narrower ground than the motion by the city to vacate. The only difference in the two applications is that the former presented all the facts and circumstances to the court, while the present one presents only a part of them. But surely that cannot change the effect of the decision against the city. If there was no authority in the corporation counsel to offer judgment, then the city ought to have succeeded in the motion; but, since it failed, the point must have been decided adversely to it, and so it appears from the decision which was adopted by this court. O'Brien *v.* Mayor, etc., *supra*. Moreover, it has been held in other cases that a motion of that character made by the city, when finally decided, binds not only the immediate parties, but the citizens and taxpayers as well. They are deemed to be represented by the city in the proceedings, and, in the absence of fraud or collusion, are bound as effectually as the city itself. Ashton *v.* City of Rochester, *supra*; Osterhoudt *v.* Rigney, 98 N. Y. 223; Rogers *v.* O'Brien, 153 N. Y. 357, 47 N. E. 456. This case involves much more than the narrow question concerning the power of the corporation counsel to offer judgment in a pending action, even if it was still an open one, and not conclusively settled against the plaintiff, as I think it is by the decision of this court in this and other cases. O'Brien *v.* Mayor, etc., *supra*; Mark *v.* City of Buffalo, 87 N. Y. 184; People *v.* Stephens, 52 N. Y. 306; People *v.* Common Council of City of Auburn, 85 Hun 601, 33 N. Y. Supp. 165. The legislature has just changed the law in that respect,—a clear recognition of the fact that it

was otherwise before. Chapter 284, Laws 1900. But the plaintiff's complaint is defective in the other particulars which have been pointed out, even if the plaintiff could impeach the judgment record and the affidavit of the corporation counsel as to his authority to make the offer,—a proposition that is more than doubtful in the absence of any allegation of fraud. Conceding every fact alleged, they furnish no ground for an action in behalf of a taxpayer to impeach the judgment; and, moreover, it appears from the complaint that the plaintiff is seeking to litigate questions already decided against the city, and consequently against the citizens and taxpayers, since they constitute the city. 1 Dill. Mun. Corp. § 40. For these reasons, the judgment should be affirmed, with costs, and the question certified answered in the negative.

BARTLETT, VANN, and CULLEN, JJ., concur with HAIGHT, J., for reversal.

PARKER, C. J., and O'BRIEN, J., read for affirmance, and LANDON, J., concurs.

Judgment reversed, etc.

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RICHARDSON

*v.*

DAVIS.

(*Court of Appeals of Maryland, June 14, 1900.*)

**Streets—Dedication.***—Where an owner lays off land in lots and sells them as bounding on certain streets, which are sufficiently designated, the streets called for are held as dedicated to the public, and the vendor is bound by an implied covenant to the purchase to keep them open, and the purchaser takes the lot he buys subject to the servitude upon so much of the bed of the street as goes to him under his purchase.

*See Ralston *v.* Town of Weston (W. Va.), 1 Mun. Corp. Cas. 748, and *note*, 763.

Richardson *v.* Davis

**Same—Same—Nonuser.**—Mere nonuser and lapse of time do not constitute an abandonment of a dedicated street.

**Same—Substitution—Evidence.**—The contention of defendant as to the alleged substituted avenue was not sustained by the evidence.

APPEAL by defendant in equity from Baltimore county circuit court. *Affirmed.*

Argued before MCSHERRY, C. J., and BRISCOE, PAGE, BOYD, SCHMUCKER, and JONES, JJ.

*D. H. Emory*, for appellant.

*Philip Bartley Watts*, for appellee.

BRISCOE, J. The appellee, Bellese Davis, filed a bill in this case in the circuit court for Baltimore county for an injunction to restrain and prohibit the appellant, the defendant below, from maintaining a gate and fence across the bed of a portion of Morris avenue, in Lutherville, Baltimore county, and also from interfering with the free use of this avenue by the plaintiff, or by any other person desiring to use it. The bill also prays for a mandatory injunction to require and compel the defendant to remove the gate, fence, and all other obstructions erected by her across the bed of the avenue. The case was originally heard on bill and answer, and on the 10th of July, 1899, the court held that the avenue had been dedicated to the public use; but, in consequence of an allegation that another avenue had been, in the year 1866, by common consent, opened and substituted in the place and stead of Morris avenue, the bill of complaint was retained for further proceedings. The case was subsequently heard on bill, answer, and proof, and this appeal is from a decree of the circuit court for Baltimore county, dated the 21st of December, 1899, declaring that the bed of Morris avenue was dedicated to the public use as a street, and directing an injunction prohibiting the maintaining of all obstructions now in the bed thereof, and further granting a mandatory injunction requiring the removal of the gate,

fence, and all other obstructions, which had been erected by the defendants across or in the bed of the avenue.

There can be but little controversy as to the question of dedication raised by the pleadings and facts of this case. It is admitted that Morris avenue was laid out on a map or plat of Lutherville, as far back as August 24, 1854, by the trustees of the Lutherville Female Seminary of Baltimore County. The plat or plan divided the property into lots, and upon this plat Morris avenue was laid out by the then owners of the land, and extended as a public street or avenue. Besides this, it appears from the deed itself under which the appellant claims title that the trustees of the Lutherville Female Seminary of Baltimore County expressly reserved the right and use of so much of the lot of land as may be required to lay out, open, and extend the avenues, streets, and alleys designated on the plat of the whole tract of land, called 'Lutherville''; that the avenues, streets and alleys are to be laid out and opened for the use and benefit in common of the owners and occupants of lots now sold or hereafter to be sold in the village of Lutherville. Now, the law on the sucject of dedication has been repeatedly laid down by this court to be that where an owner lays off land in lots, and sells them as bounding on certain streets, which are sufficiently designated, the streets so called for are held as dedicated to the public, and the vendor is bound by an implied covenant to the purchaser to keep them open, and the purchaser takes the lot he buys, subject to the servitude upon so much of the bed of the street as goes to him under his purchase, in fee. White *v.* Flannigan, 1 Md. 525; Lippincott *v.* Harvey, 72 Md. 577, 19 Atl. 1041. It is also well-settled law that mere nonuser and lapse of time do not constitute an abandonment of a dedicated street. Mayor, etc., *v.* Frick, 82 Md. 85, 33 Atl. 435; McCormick *v.* Mayor, etc., 45 Md. 524.

Streets—Dedication.

Same—Same—Nonuser.

The question of substitution, relied upon by the appellant, is one of fact, and depends upon the evidence in the case.

Richardson *v.* Davis

Same—Substitution—Evidence.

It appears that Morris avenue is one of the principal streets of the town. According to the testimony it is a half mile long and 50 feet wide, and runs through the center of the town. It is opened for travel its entire length, except about 350 feet, where it runs through the appellant's land. The avenue which it is alleged was substituted in its place is about 40 feet wide and 400 feet deep, and it was extended, in 1872, by one of the lot owners, 100 feet easterly, for his own private convenience. Mr. Coonan, the engineer who testified in the case, says that it is indicated on the plat by red lines, and is marked "Twenty-Foot Avenue or Lane"; that it comprises the northerly half, for a depth of about 300 feet, of a blind avenue of irregular width, extending easterly from Franche avenue for a distance of about 500 feet, where it terminates at a fence which extends across the full width of the avenue. It has several small houses and a stable on it. The proof shows that this blind avenue or alley was opened simply for the benefit of the appellant and another lot owner of the town of Lutherville. All the witnesses except one state that "they never heard, until this suit, that it was supposed by anybody that the opening of this avenue was a substitution by common consent of the owners and occupants of lots in the town of Lutherville for Morris alley." It is quite clear, we think, that the contention of the appellant as to this substituted avenue cannot be sustained.

Nor do we think that the appellee is estopped by the decree of the court of Baltimore county, passed on the 2d of October, 1873, in the case of Marston *et al.* against Commissioners of Lutherville, and which is set forth in the record. It in no way affected the rights of the parties now before the court. For these reasons, the decree of the circuit court for Baltimore county will be affirmed. Affirmed, with costs.

SOUTH BELLEVUE LOT ASS'N

*v.*

TOWN OF BELLEVUE.

(*Court of Appeals of Kentucky, Sept. 26, 1900.*)

**Streets—Liability of Municipality for Cost of Improvement Made by Lot Owner.**—A municipality is under no obligation to pay the costs of a street improvement made without its authority by a lot owner.

APPEAL by plaintiff from Campbell county circuit court. *Affirmed.*

*M. R. Lockhart*, for appellant.
*M. Herold*, for appellee.

DU RELLE, J. The appellant, in 1894, proposed to the appellee town to construct a street within the town limits. The proposition was accepted, and the street constructed, and accepted by the municipality. Afterwards, in 1897, a violent rainfall occurred, damaging the street, and the appellant corporation, to prevent greater damage to the street, upon which it owned abutting lots, employed a contractor to repair it, who, it is averred, repaired it for a reasonable charge, and in exactly the manner the town would have done it had it made the repairs. Suit was brought by the lot association against the municipality for the cost of the repairs, and a demurrer sustained to the petition. It is conceded that nothing was done by the town authorities to authorize the improvement to be made, but appellant claims that the town got the benefit of the work done, and ought, in equity and good conscience, to pay for it. The general rule is that municipal corporations can bind themselves only in the manner prescribed by the law which gives them being. The authorities of the municipality have power, in a prescribed mode, to

create indebtedness for improvements on the part of the town. They have no authority to create such indebtedness in any other mode. And as the officers of a town, acting as individuals, have no authority, by express promise, to bind the town to pay for improvements, so the mere knowledge by such officers that improvements are being made without authority cannot possibly raise a presumption of an implied promise so as to bind the town. In this case there is no claim that the town, or any of its officers, had knowledge of the making of the improvements sued for. The fact that an improvement is beneficial to the municipality cannot raise an implied promise to pay for it, and we are unable to see any moral obligation to do so, in the absence of knowledge of the improvement at the time it was made and acquiescence therein. Murphy *v.* City of Louisville, 9 Bush 194; Zottman *v.* City of San Francisco, 81 Am. Dec .105; Drexelius *v.* City of Covington, 4 Ky. Law Rep. 258; Dill. Mun. Corp. § 460; 15 Am. & Eng. Enc. Law 1084; City of Jeffersonville *v.* The John Shallcross, 35 Ind. 19; City of Covington *v.* Hallam, 16 Ky. Law Rep. 128; Trustees *v.* Hohn, 82 Ky. 1; Neinaber *v.* Tarvin (Ky.), 46 S. W. 513. For the reasons given, the judgment is affirmed.

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LOUISVILLE & N. R. Co.

*v.*

MOBILE, J. & K. C. R. Co.

(*Supreme Court of Alabama, Nov. 21, 1899.*)

Railroads in Streets—Authority of City to Grant Franchise—Statute.*—In the absence of express authority conferred by the legislature, a municipal corporation has no power to grant a franchise of its public streets and highways for railroad purposes, and no such authority was conferred upon the city of Mobile by Acts 1894–95, p. 382.

*See notes at end of case.

Louisville, etc., R. Co. *v.* Mobile, etc., R. Co

**Same—Right of Railroad as Abutting Owner to Enjoin.***—A railroad company as an abutting lot owner is entitled to enjoin the unauthorized construction of a railroad track upon the street by another company, where special injury will result to complainant as a lot owner from the construction and operation of the proposed line of railroad.

**Same—Same—Estoppel.**—The fact that a railroad company is occupying a street with its line under an ordinance which is void because of want of authority in the city to grant a franchise of its public streets and highways for railroad purposes would not estop it as an abutting lot owner from enjoining such an unauthorized occupation of the street by another company; nor would the fact that the complainant company had entered into a contract with the city to permit the defendant company to cross complainant's track in such street without compensation be a defense in an action by the former company to enjoin such an unauthorized occupation of the street by the other railroad.

APPEAL by plaintiff from Mobile county chancery court. *Reversed.*

*Gregory L. Smith* and *Joel W. Goldsby*, for appellant.
*McIntosh & Rich*, for appellee.

DOWDELL, J. The appellant, the Louisville & Nashville Railroad Company, filed its bill in the chancery court of Mobile county, seeking to enjoin the appellee, the Mobile, Jackson & Kansas City Railroad Company, from constructing and laying its track upon and along Water street, a public highway in the city of Mobile. The equity of the bill is predicated upon the averments that the complainant company is now, and has been for many years, operating its railroad as a common carrier of passengers and freight along and upon said Water street under a franchise granted by the city of Mobile, and that it (the complainant company) is the owner in fee of the abutting land on the east side of said Water street, a part of which is situated north of Eslava street, and part south of that street, and also owned certain lots in what is known as the "Bernoudy Tract," at the foot of the south terminus of

Case Stated.

*See notes at end of case.

Water street. There are also averments of occupancy by the complainant company of certain other parts of said Water street with its tracks and turnouts for railroad purposes, but the necessities of the case do not require any more particular statement of these allegations; that the defendant company proposes to build and construct its track along and upon said Water street, and east of the center of said street, and over and across the lands of complainant in the Bernoudy tract, at the terminus of said Water street, without condemnation proceedings, and without even paying just compensation therefor to complainant; that the defendant intends to do this work in a single night, and avoid an injunction. It is also averred that the building of defendant's railroad upon and along said street, and the operation of its locomotives and cars over the same, will materially obstruct said street as a public highway for wagons, drays, and other vehicles, for which purposes it has been and is now used by the public, and thereby constitute a public nuisance in said street. It is also averred in the bill that the contemplated action of the defendant company is under a pretended franchise from the city of Mobile to the defendant company, granting it the right to construct its railroad along said street, and to operate its locomotives and cars over the same; and it is charged and averred that the city of Mobile had no power or authority under its charter to grant any such right or franchise as that claimed by the defendant, and that the ordinance passed by the city granting the franchise is void for want of authority under the charter to enact the same. While the answer of the defendant company denies all intention or purpose of surreptitiously constructing its railroad along said street, or of taking plaintiff's property for purposes of right of way without first paying to complainant just and fair compensation therefor, it admits that the defendant intended and proposed to exercise its right to complete and build its railroad along and upon said street under the franchise granted it by the city of Mobile under an ordinance of October 8, 1895, wherein defendant was granted the right of

way for its track in Water street from the southern end of said street north to the intersection of Church street, a copy of which said ordinance is attached as an exibit to the answer. But it is averred in the answer that, before doing so, it was the intention of the defendant to first pay to the complainant just and fair compensation for any property of the complainant taken by the defendant for its right of way, and also to pay all damage that might be done to the complainant's property by the building and operating of its (the said defendant's) proposed railroad. The case was heard in the court below upon the pleadings and proof, and a final decree was rendered dismissing the complainant's bill. There was no proof that the defendant company intended to construct the proposed track in a surreptitious manner, and without first paying a just compensation for any property of complainant that might be taken by the defendant, and this theory of the case might be regarded as having been abandoned by the complainant. There was much testimony *pro* and *con* as to whether the occupancy of Water street by both companies with their railroads would practically destroy it as a public highway for ordinary and common uses, but for the purposes of this case we deem the determination of this issue of fact unimportant. It is not disputed that the building of the proposed railroad in said street would amount to such an obstruction of same as to impair the free and ordinary use thereof by the public generally as a public highway.

The ownership by the complainant, as an abutting proprietor, of property along said street, and lots at the terminus of said street in the Bernoudy tract, as charged in the bill, is shown without contradiction. The case, as thus presented, in one of its phases, under the pleadings and proof, is that of an adjacent proprietor asking to enjoin a defendant from permanently obstructing a public street in such a manner as to impair the usual and customary uses of the same by the public, and of special injury and damage to complainant; or, in other words, to enjoin the doing of that which would

constitute a public nuisance, and specially injurious to the property rights of complainant. It cannot be doubted that an unauthorized obstruction of a street in an incorporated town or city is a public nuisance. State *v.* Mayor, etc., of Mobile, 5 Port. (Ala.) 279; Costello *v.* State, 108 Ala. 49, 18 South. 820, 35 L. R. A. 303; Whaley *v.* Wilson, 112 Ala. 629, 20 South. 922; Wood, Nuis. (3d Ed.) §§ 248–250. We think it equally clear that the unauthorized construction of a railroad in a street is a public nuisance that may be enjoined. Schurmeirer *v.* Railroad Co., 10 Minn. 82 (Gil. 59); Theobold *v.* Railroad Co. (Miss.), 6 South. 230, 38 Am. & Eng. R. Cas. 462; Stowers *v.* Telegraph-Cable Co. (Miss.), 9 South. 356. In such cases the bill may be filed, and relief by way of injunction be had, by any person who would sustain special injury on account of the nuisance. Mayor, etc., *v.* Rodgers, 10 Ala. 47; Whaley *v.* Wilson, *supra*; Douglass *v.* City Council (Ala.), 24 South. 745; Railway Co. *v.* Witherow, 82 Ala. 190, 3 South. 23, and authorities there cited. But it is contended by the defendant that the building and operating of its proposed railroad upon and along said Water street would not be an unauthorized obstruction of that street. This contention, of course, must rest upon the validity of the city ordinance of October 8, 1895, granting the right to the defendant company to build its track and operate its trains over said street. The validity of this ordinance must depend upon the power and authority conferred upon the city under its charter to make the grant in question. The principle is well settled in this state that, in the absence of express power conferred by the legislature, a municipal corporation has no authority to grant a franchise of its public streets and highways for railroad purposes and uses. Perry *v.* Railroad Co., 55 Ala. 426; Port of Mobile *v.* Louisville & N. R. Co., 84 Ala. 120, 4 South. 106; Costello *v.* State, *supra*. See, also, 6 Am. & Enc. Law, p. 518, and authorities there collated. Prior to the act of February 6, 1895 (Acts 1894–95, p. 382), the charter of the city of Mobile passed under

Railroads in Streets—Authority of City to Grant Franchise—Statute.

review in this court upon the question now before us, and it was then determined that the charter conferred no power or authority upon the city to grant rights of way to railroads in its streets. Perry *v.* Railroad Co., *supra*; Port of Mobile *v.* Louisville & N. R. Co., *supra*. This brings us to a consideration of the act of February 6, 1895, above referred to. This act purports to amend certain sections of an act entitled "An act to incorporate the Port of Mobile, and to provide for the government thereof," approved December 10, 1886. If any power or authority is conferred upon the city by this act to grant rights of way in the streets, it is to be found in section 4, as this is the only section that contains any reference to the subject. Section 4 reads as follows: "Be it further enacted, that in order that its duties may be efficiently preformed, the said general council shall have full power and authority to make, adopt and declare by-laws or ordinances not in conflict with the laws of this state or the United States which shall have force and effect in said city of Mobile for and concerning the several matters mentioned in this section, and therein to provide and declare such fines, penalties and forfeitures, imprisonment or hard labor within the limitations and restrictions hereinafter provided, as it may deem appropriate; and any person or persons violating or disobeying such by-laws or ordinances may be punished therefor, as provided in such by-laws or ordinances upon conviction thereof before said mayor who shall have jurisdiction and cognizance of such matters; that is to say, said general council may make, ordain and declare such by-laws and ordinances for and concerning the prevention and removal of nuisances, the prevention and extinction of contagious or infectious diseases; water supply; the lighting of streets, avenues and public places; the licensing and regulation of retail liquor dealers and of hackney coaches, carriage, wagons, hacks and drays; the regulation of pawn brokers; the restraint or prohibition of gambling; the regulation of theatrical and other entertainments and amusements; the establishment, regulation and management of markets;

the erection and repairing of bridges, the construction, repairing and regulation of sidewalks, streets, avenues, roads and of drains, sewers, pipes and appurtenances or appendants thereto or thereunder; it may also make ordinances concerning the rights of way, regulation of street cars, street railways and all other railroads; the storing and handling of gunpowder, dynamite, oil and all other inflammable or hazardous substances, and may establish and regulate magazines within or without the city and may own and regulate property inside or outside of its limits for magazines, pest houses, quarantine and other purposes; the establishment and regulation of fire wards, fire companies and fire departments; the establishment and regulation of fire limits; concerning the sinking and repairing of wells; erection and repairing of pumps; the removal or pulling down of houses, fences and other structures to prevent the spread of fire and to extinguish the same; the regulation of partition and other fences, and of partition and other walls; the prevention of disorderly assemblies and houses; the establishment, prevention and regulation of city cemeteries, whether within or without the city limits; and also such by-laws and ordinances as may require vagrants, idlers, disorderly or dangerous and suspicious persons, all persons of evil life or ill fame, and such as have no means of support, or likely to become chargeable to the city of Mobile or to Mobile county as paupers, all persons found drunk in or about the streets or loitering in or about tippling houses, or who can show no reasonable cause for not having an occupation or employment or business, or who have no fixed place of residence, or who cannot give a good account of themselves, or all such as may be grossly indecent in language or behavior publicly in the streets, and all prostitutes or such as lead a notoriously lewd or licentious course of life, to leave the city or give bond and security, to be approved by said mayor, for their good behavior for a reasonable time and for indemnity against any charge for their support by said city of Mobile, said council may provide upon their failure or refusal to give such bond and

security or leave the city, for their condemnation to labor under the direction of said general council for a limited time, not to exceed three calendar months, unless such bond and security should be given sooner: provided, that no fines or penalties imposed by such ordinances or by-laws shall exceed fifty dollars for any offense, and provided further, that any person failing to pay any fine or penalty imposed on him under and by authority of this act, may be sentenced to hard labor for such reasonable time, not exceeding three calendar months for any one offense as may by the mayor be deemed equivalent in punishment to such fines and penalty and the costs of the case, considering also the cost of keeping and maintaining such persons. * * *" As argued by counsel for appellant, it is obvious that these provisions are intended to provide police regulations, and not to authorize a grant of any right or franchise in the street. This seems manifest both from the character of all other matters associated in the section and from the fact that, when it contemplates the erection of anything,—such as bridges and sidewalks,—it expressly says so, as well as from the provisions for the enforcement of the ordinances by fines and imprisonment. The language of the act, "It may also make ordinances concerning the rights of way, regulation of street cars, street railways and all other railroads," would seem to exclude the idea of the grant of new rights of way. The charter restricts the power to make ordinances "concerning the rights of way"; *i. e.* to particular rights of way, such as already exist, or such as thereafter may be legally created. There is manifestly no unequivocal and express grant of power to create rights of way contained in the provision, nor do we think that such grant of power under the act arises by necessary implication. In Grand Lodge *v.* Waddill, 36 Ala. 318, this court said: "Grants of power to corporations, unlike the grants of individuals, are to be strictly construed in favor of the government and against the grantee. Corporations can claim nothing that is not clearly given. Ambiguities operate against them. In the construction of every charter,

to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation,"—citing Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9; Richmond, F. & P. R. Co. *v.* Louisa R. Co., 13 How. 81, 14 L. Ed. 55; Sedg. St. & Const. Law 338–342. To say the least of it, the grant of power to create rights of way by the act in question is involved in doubt, and that which is not unequivocally granted in the charter of a city must be taken to be withheld. Port of Mobile *v.* Louisville & N. R. Co., 84 Ala. 115, 4 South. 106; Costello *v.* State, *supra*; Birmingham & Pratt Mines St. R. Co. *v.* Birmingham St. Ry. Co., 79 Ala. 471. From the foregoing authorities, our construction of the act of February 6, 1895, leads to the conclusion that under it the city had no authority to grant rights of way to railroads over its streets.

Same—Right of Railroad as Abutting Owner to Enjoin.

It follows, therefore, that the ordinance of the city under which the defendant claimed its franchise and right to contruct its railroad in Water street was without legislative authority, and therefore null and void. On the undisputed facts as to the complainant's ownership of lots abutting the said street, and the special injury to result to complainant as such attingent property owner by the constructing and operating of defendant's proposed line of railroad, the complainant was entitled to the injunctive relief sought.

It is no defense to complainant's bill that the complainant itself is operating a railroad along said street. If it be conceded that the complainant is operating a railroad along said street without authority, thereby creating a public nuisance, we fail to see wherein that could justify or excuse the defendant in creating an additional nuisance. There is no element of estoppel under the facts. If the servitude laid on the streets by the complainant in the laying of its railroad tracks and the operation of its trains thereon injuriously affects the abutting property of the complainant, the additional servitude proposed by the defendant would most naturally tend to increase the damage. Besides, the fact that complainant is inju-

Same—Same—Estoppel.

riously affecting its property cannot prevent it from complaining of an injury done to its property by another. Nor do we think there is any merit in the contention that the complainant obtained a grant from the city to lay additional tracks along said streets upon condition that it would consent for the defendant to cross its track with defendant's road without requiring compensation for such crossing. If the city had no authority to grant the franchise, the defendant could derive no right or benefit from the contract of the complainant with the city to permit defendant to cross complainant's tracks in said street without compensation, nor was such agreement a waiver of complainant's right, as an abutting proprietor on said street, to object to the creation of a public nuisance on said street, injuriously affecting the rights of complainant. The view we have taken of the case renders it unnecessary to consider other questions discussed by counsel. The decree of the chancery court is reversed, and the cause remanded.

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NOTES.

**POWER OF MUNICIPAL CORPORATION TO AUTHORIZE USE OF STREETS BY RAILROADS.**

**Cannot Do So under General Powers.**—According to the weight of authority, a municipal corporation cannot confer the right to lay the tracks of a steam railroad in a street, unless empowered to do so by the legislature either expressly or by necessary implication. People's Pass. R. Co. *v.* Memphis City R. Co., 77 U. S. 38; Savannah, A. & G. R. R. Co. *v.* Shiels, 33 Ga. 601; Daly *v.* Georgia, S. & F. R. Co. (Ga.), 36 Am. & Eng. R. Cas. 20; Murphy *v.* Chicago, 29 Ill. 279; Chicago, etc., R. Co. *v.* People, 73 Ill. 548; Milhaw *v.* Sharp, 27 N. Y. 618; Davis *v.* Mayor, etc., of New York, 14 N. Y. 506, 67 Am. Dec. 186; Portland & W. V. R. Co. *v.* Portland, 14 Or. 188; Commonwealth *v.* Erie, etc., R. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; Pa. R. Co. *v.* Mish, 115 Pa. 514; Tennessee & A. R. R. Co. *v.* Adams, 3 Head (Tenn.) 596.

The general powers over the streets vested in municipal corporations do not confer upon them the right to authorize the use of a street by ordinary railroads. Daly *v.* Georgia Southern & F. R. Co., 80 Ga. 793, 36 Am. & Eng. R. Cas. 20, 7 S. E. Rep. 146.

## Notes

Converting the streets of a municipality to ordinary railroad purposes is devoting them to an exclusive use, and cannot be permitted without express legislative authority. New York & H. R. Co. *v.* Mayor, etc., of New York, 1 Hilt. (N. Y.) 562.

The use of streets for a railroad track is not within the use to which they were originally dedicated; and a city cannot, by virtue of a provision in its charter that the council shall have "exclusive control of the streets, sidewalks, lanes, alleys, market places, and other public grounds within the corporate limits," authorize a railway company to construct its track along one of the city streets. Ruttles *v.* Covington (Ky.), 38 Am. & Eng. R. Cas. 408, 10 S. W. Rep. 644.

In the case this court, in delivering the opinion, said: "The language of the statutes in the case of Railroad Co. *v.* Applegate, 8 Dana (Ky.) 294 and Elizabethtown, etc., *v.* Combs, Bush (Ky.) 384, was radically different from that used in the section quoted. In each of those cases authority was expressly given to the respective companies to construct their roads through the cities mentioned in the charters. As the legislature has not seen proper to give to the company in this case, in express terms, the right claimed, we are not authorized to strain the language of the statute for that purpose when the effect would be to seriously impair the usefulness of the public streets of Covington, and do injury to the rights of individuals. Therefore the judgment is reversed, and cause remanded for further proceedings consistent with this opinion."

**Where Municipality Has Exclusive Control of Its Streets.**—There are cases holding that where a municipal corporation has been granted exclusive control of its streets, it may confer upon a railroad company the right to use the streets for railroad purposes. See Dubach *v.* Hannibal & St. J. R. Co., 89 Mo. 483; Moses *v.* Pittsburg, etc., R. Co., 21 Ill. 516; Kistner *v.* Indianapolis, 100 Ind. 210; New Albany & S. R. Co. *v.* O'Daily, 13 Ind. 353.

**Right of Abutter to Enjoin Unauthorized Use of Street for Railroad Purposes.**—An injunction will be granted to restrain a railroad from the unauthorized construction of a track along the public street of a municipal corporation, at the instance of an abutting owner who would be specially injured thereby. Columbus & W. R. Co. *v.* Witherow, 82 Ala. 190, 3 So. Rep. 23; Savannah, A. & G. R. R. Co. *v.* Shiels, 33 Ga. 601; Higbee *v.* Camden & A. R. Co., 19 N. J. Eq. 276; Fanning *v.* Osborne, 102 N. Y. 441.

But the injury suffered by the lot owner must be a special injury. Zabriskie *v.* Jersey City & B. R. Co., 13 N. J. Eq. 575.

## CITY OF CHESTER

*v.*

## WABASH, C. & W. R. CO.

(*Supreme Court of Illinois, Oct. 16, 1899.*)

**Use of Streets by Railroads—Petition of Property Owners as Condition Precedent to Power of City to Grant—Estoppel.***—Where the law makes a petition of property owners a condition precedent to the power of a municipality to grant the use of any street to a railroad company, and such a petition requests that the railroad be granted the use of a street for the term of 20 years, the municipality cannot make the grant for a longer period, and the railroad company cannot, by any expenditure of money, or otherwise, place itself in a condition to claim that the property owners are estopped from asserting their right to have had the grant made in strict accordance with the petition.

APPEAL by plaintiff from Randolph county circuit court *Reversed.*

The appellant brought its action of ejectment against the appellee to recover possession of certain premises in the city of Chester, described as "all that part of Water street lying between Angle street and Pine street, occupied by the defendant as and with a railroad track, and claimed by the appellant in fee," after demand in writing for the possession thereof. The appellee claims the right to the premises in question under certain proceedings of the city council of Chester had November 20, 1877, granting certain rights to the Chester & Kaskaskia Railroad Company, to the rights of which company the appellee claims to have lawfully succeeded. On November 20, 1877, a special meeting of the city council of Chester was held, for the purpose, as shown by the minutes, of taking action "on the extension of railroad facilities to the Southern Illinois Penitentiary," then being constructed near

*See preceding case and *note.*

the city of Chester. A petition bearing 20 signatures, being the owners of a majority of the property fronting on Water street, was at this meeting presented to the council, requesting it to grant the right to lay a railroad track along Water street, in front of their property, to the Chester & Kaskaskia Railroad Company, from the intersection of Hancock street with Water street, and along said Water street to the western limits of the city, for the term of 20 years. On the reading of this petition, a former ordinance, being Ordinance No. 36, granting the right of way to C. B. Cole and associates to lay down a single track over the property in question, was repealed, and Ordinance No. 37 was adopted by unanimous vote of all present. This ordinance contains recitals in its preamble that the construction of the penitentiary makes it necessary to extend the railroad through the city from the terminus of the Iron Mountain, Chester & Eastern Railroad to a point north of the city; that the Chester & Kaskaskia Railroad Company had been organized for that purpose, and had surveyed its railroad along Water street, and that the owners of more than one-half of the land fronting on Water street had petitioned the council to grant the right of way over Water and other streets from Hancock street to the northern limits of the city for the term of 20 years. Section 1 grants the right to the Chester & Kaskaskia Railroad Company to lay down, construct, and maintain its railroad from the terminus of the Iron Mountain, Chester & Eastern Railroad across Hancock street, on and along Water and Front streets, to the northern limits of the city of Chester, to use no more of such streets than is necessary to construct and operate said railroad, and provides that the railroad company shall conform to all grades now or hereafter established for said streets, and shall construct its track in such a manner that teams, etc., may cross and recross same, and makes the company amenable to all ordinances now or hereafter in force. The words "for a period of twenty years" appear in the proceedings as interlined in red ink, and oral testimony was introduced to

prove by some of the signers of the petition that they signed it with the distinct understanding that it was for the period of 20 years only. It was stipulated that the Chester & Kaskaskia Railroad Company was incorporated October 25, 1877, for a period of 50 years, and that the appellee acquired all its property rights April 27, 1878. On March 15, 1881, the city of Chester leased to the appellee a part of the levee between Water street and the river, extending to low-water mark, and between Angle street on the north aad McFerron street on the south, for 10 years, for a rental of $50 per annum, for the purpose of maintaining a coal dump, and for the mooring of boats, etc., with the right to cross all streets and alleys necessary. On April 6, 1891, another lease was entered into between the same parties, the city acting under authority of an ordinance passed for that purpose, leasing to the railroad company "that part of the levee and wharf or landing lying between Angle street and the north side of Erskin street, and extending to low-water mark of the Mississippi river," and authorizing the railroad company to take possession of the same for the purpose of erecting, maintaining, and operating a transfer incline and cradle for the purpose of transferring cars to boats; also, a coal dump, and for mooring boats, etc., and the right to use all streets lying between the present track of the railroad company and the levee as may be necessary for the storage, handling, or transfer of cars, and operating the coal dump, for the period of 37 years, at an annual rental of $50 per annum.

The appellee, shortly after the making of the lease, constructed the cradle referred to, with tracks and approaches thereto, without protest or interference by the city or any of the citizens, and it claims that the property in question in this suit is necessary to the maintenance of the same, and that the city is estopped, by reason thereof, from asserting claim to the property in question, and that the rights given by the ordinance of date November 20, 1877, inured to it for the full term of the corporate existence of the charter of the Chester & Kaskaskia Railroad Company, and not for 20

years only. On trial before the circuit court the contention of appellee was sustained, and a finding and judgment were entered accordingly, from which this appeal is taken. The plaintiff asked the court to hold, as a matter of law, that the owners of property abutting on the street, when they signed the petition to the city council to grant the railroad company the privilege of laying its railroad track on the street and maintaining a railroad thereon, had the right to impose any condition they saw fit, and by their petition limited the grant for the term of 20 years, and that the city council was bound by the terms of the limit so imposed. Further, that, as a matter of law, the ordinance under which the defendant claims the right to maintain its railroad tracks on the street limits the right to the term of 20 years from the time the ordinance took effect. These propositions the court refused to hold, to which plaintiff excepted. Thereupon the defendant asked the court to hold, as propositions of law, that the owners of property abutting a street, in a petition to a city council to permit a railroad company to occupy a street with its tracks, have no power to impose a limit as to time inconsistent with the duty of the railroad company to properly serve the public during the term of its chartered existence; further, that the city may and should disregard any limitation contained in the petition which, if enforced, would prevent the railroad company from exercising its functions or performing its duties to the public during the term of its chartered existence; that the recital in the preamble of the petition as to the contents and terms thereof is immaterial, and the ordinance is to be construed without reference to such recital, or to the facts therein stated; that the ordinance cannot be controlled or modified by recitals contained in the preamble, and that the ordinance is to be construed as granting the right of way to the railroad company to lay its tracks in the street and maintain the same for the whole term of the corporate life of the railroad company, inasmuch as the ordinance itself is silent as to the length of time of the grant. These propositions requested to be held by the defendant

were by the court so held, to which the plaintiff then and there excepted.

*Dill & Wilderman*, *Alexander Hood*, and *Wm. M. Schuwerk*, for appellant.

*G. W. Wall* and *H. Clay Horner*, for appellee.

PHILLIPS, J. (after stating the facts). Water street, in the city of Chester, being admitted to be a public street therein, it is a presumption of law that the fee of the street is in the city, and ejectment may be resorted to as a proper remedy to recover the same from one who encroaches thereon. The title of the street being in the city for the use of the public, it may not grant the use of that street, inconsistent with the rights of the public therein.

At the time the ordinance in question was adopted, paragraph 90, § 1, art. 5, c. 24, of the Revised Statutes, was as follows: "The city council or board of trustees shall have no power to grant the use of, or the right to lay down any railroad tracks in, any street of the city to any steam or horse railroad company except upon a petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes." No right existed in the city council to grant the use of the street for the purpose of laying down railroad tracks by this railroad company except upon the presentation of a petition as provided for by the foregoing paragraph. It was held in Byrne *v.* Railway Co., 169 Ill. 75, 48 N. E. 703 (on page 85, 169 Ill., and page 705, 48 N. E.): "Where, as here, the constitution and General Statutes of the state make the consent of the municipal authorities a condition precedent to the exercise of the right to construct and operate a railroad in the streets of the city, such authorities necessarily have the power to prescribe the conditions upon which they will grant their consent. They may impose any conditions not illegal, and not forbidden by statute." Inasmuch as the city council can only act on the petition of the owners of land fronting on the street, it can-

not create conditions to the prejudice of such landowners to a broader extent than authorized by the petition itself; and, as the basis of the action by the city council is the petition of the property owners fronting on the street, such property owners may, with reference to the time the street is to be used, impose such terms by their petition as in their judgment will best subserve their and the public interests, and may limit the time that the right granted shall continue, and such limitation will be binding on the city council. In McCartney *v.* Railroad Co., 112 Ill. 611, where an act of the legislature of 1865 confirmed an ordinance of the city of Chicago granting to a railway company chartered by special act the right to lay a track on and over certain streets of the city for passenger cars only, and the city subsequently became incorporated under the general act containing the provision of paragraph 90, as hereinbefore cited, and the railroad company subsequently desired consent to use the tracks for freight cars also, and urged that the consent required by the city council is only as to the laying down of tracks, and not as to the use of tracks which had been constructed, and that in case of a railroad track once rightfully laid there is no restriction upon the city as to the granting any use of it, with reference to that proposition the court held (page 638): "This we regard a too strict interpretation of the provision in question. Where a railroad company lays its tracks in a street, having but the right to construct and maintain a track for passenger cars only, we think that under this provision of the statute the city has no power afterwards to grant the use of the track for the operation of freight cars upon it, except upon petition of property owners upon the street, as named in the statute. The granting of the use of freight cars upon a track which was one for passenger cars only, would, we consider, within the intendment of this statute provision, be tantamount to granting the right to lay down a track for freight cars, and so come within the provision. But, if the grant of this use for freight cars be unauthorized, it is

objected that the complainants in this case have no right to any relief as to the use of freight cars in Hawthorne avenue; that the city has the exclusive control of the streets, and represents the public in all matters concerning them, and that no complaint can be made, other than by the city, or by the abutting property owners whose consent should have been obtained. Where this required consent has not been obtained, the city is absolutely without power to grant the license, and the exercise of it would be wholly without warrant and unlawful. In People *v.* Chicago W. D. Ry. Co., 118 Ill. 113, 7 N. E. 116, where certain conditions were sought to be inserted in the petition of property owners, this court said (page 120, 118 Ill., and page 119, 7 N. E.): "It is true that the property owners might have inserted such conditions in their assent as they thought proper, and the common council might have been powerless to grant the railway company permission to occupy the streets except upon the conditions specified by the property owners in their consent." To the same effect are Chicago, D. & V. R. Co. *v.* City of Chicago, 121 Ill. 176, 11 N. E. 907, and Hunt *v.* Railway Co., 121 Ill. 638, 13 N. E. 176.

The right granted by a city council to a railroad company to lay its tracks in a street and operate its cars thereon is not a franchise, but a property right, merely contractual, and subject to the same conditions, restrictions, and limitations as any other property owned by other persons. City of Belleville *v.* Citizens' Horse Ry. Co., 152 Ill. 171, 38 N. E. 584; Byrne *v.* Railway Co., *supra*. And such contract rights, so far as they affect the public, are to be strictly construed in favor of the public. The city council having no power to permit the use of its streets by a railroad corporation without the necessary petition, as required by paragraph 90, heretofore cited, and a right to a limitation existing with reference to the property owners by incorporating in their petition a limitation of the extent to which the city council should go in conferring such power on the railroad corporation, and the power conferred by the city council being a

mere contractual right, to be strictly construed so far as it affects the public, it must necessarily be construed as not going beyond the limits fixed by the petition of the abutting property owners. The petition in this case asked that the right be granted to use the street for a period of 20 years, and when the city council made its grant by ordinance, which was accepted by the railroad company, the council was powerless to make the grant for a longer period than 20 years; and on no principle of construction can it be held that the railroad company, by reason of any expenditure of money thereon, or by procuring leases of additional property, could place itself in a position to assert a claim that abutting property owners were estopped from asserting their rights in strict accordance with the petition, which originally conferred the power on the city council, and under which, only, the railroad corporation took its rights. The railroad corporation was bound to know the law,—that the power of the city council was dependent on the presentation of the petition; and, the petition itself limiting the time for which the street should be granted to the railroad company, the latter is presumed to have had full notice of all that the petition contained. It follows, therefore, that the circuit court erred in refusing to hold propositions asked by the plaintiff, and in holding propositions asked by the defendant. The plaintiff was entitled to recover, on the facts appearing on this record. The judgment of the circuit court is reversed, and the cause is remanded. Reversed and remanded.

CITY OF CENTRALIA

*v.*

NAGELE.

(*Supreme Court of Illinois, Oct. 16, 1899.*)

**Licenses—Violation of Penal Ordinance—Appeal—Review.**—In a prosecution for the violation of a penal ordinance of a city requiring an itinerant merchant or transient vendor of merchandise to take out a license, the question whether defendant acted in either capacity was a question of fact or a mixed question of law and fact, and the judgment of the appellate court was conclusive and final on either of such questions.

**Same—Same—Costs—Liability of City.***—In such an action, the city cannot be liable for costs accruing in the case.

APPEAL by city from Fourth district appellate court. *Reversed.*

*John J. Bundy* (*Frank F. Noleman* and *W. F. Bundy*, of counsel), for appellant.

*Van Hoorebeke & Louden*, for appellee.

BOGGS, J. This is an appeal from the judgment of the appellate court for the Fourth district, reversing, and not remanding, the judgment of the circuit court of Marion county, finding the appellee to be guilty of a violation of sections 2 and 3 of chapter 21 of the ordinances of the appellant city, and adjudging a fine in the sum of $15 against him. The appellate court granted a certificate of importance. Case Stated.

Said sections 2 and 3 of the said ordinances are as follows:

"Sec. 2. That all itinerant merchants and transient vendors of merchandise, who shall sell or offer for sale, barter or exchange, any goods, wares or merchandise, or other article of value, from house to house in this city, or upon the public streets, avenues or other public grounds of this city, shall

*See note at end of case.

pay for a license so to do not less than $2 nor more than $10 for each day they shall pursue said calling within this city.

"Sec. 3. Whoever shall temporarily establish or open up a place of business in this city for the purpose of selling, bartering or exchanging any goods, wares or merchandise, or other article of value, being an itinerant merchant or transient vendor of merchandise, shall pay for a license so to do not less than $2 nor more than $20 per day for each day he shall conduct or maintain said business, and whosoever shall violate the provisions of this section shall be subject to a fine of not less than $10 nor more than $200 for each day he shall conduct such business without having obtained such license."

The appellate court incorporated in its judgment, as a finding of fact, that the appellee, "under the evidence, was not an itinerant merchant nor a transient vendor of merchandise." The propositions of law tendered to the circuit court did not ask definitions of "an itinerant merchant" or "a transient vendor of merchandise." Whether appellee acted in either of those capacities was a question of fact or a mixed question of law and fact. The judgment of the appellate court is conclusive and final on either of such questions. Capen *v.* Glass Co., 105 Ill. 185; Meyer *v.* Butterbrodt, 146 Ill. 131, 34 N. E. 152; Board *v.* Bruner, 175 Ill. 307, 51 N. E. 687; Banfill *v.* Twyman, 172 Ill. 123, 49 N. E. 985. The penalties of each of the sections of the ordinance are leveled only against an itinerant merchant or a transient vendor of merchandise. As to this, section 2 is so clear that its meaning is not challenged. Section 3 does not purport to apply to every one who should temporarily establish or open up a place of business for the purpose of selling, bartering, or exchanging goods, wares, or merchandise in the city, but only to itinerant merchants or transient vendors of merchandise. The true meaning of the section is the same as if its phrases were so transposed as to read, "Whoever, being an itinerant merchant or transient vendor of merchandise, shall temporarily

Licenses—Violation of Penal Ordinance—Appeal—Review.

Note

establish," etc. Accepting, as we must, the finding of the appellate court that appellee was not either an itinerant merchant or a transient vendor of merchandise as conclusive of those questions, it is manifest the validity or invalidity of the ordinance, to which the briefs of counsel are largely addressed, is not involved in the determination of the question of the correctness of the judgment of the appellate court. It being established by the proofs the appellee had not violated either section of the ordinance, the judgment of the appellate court that the judgment of the circuit court should be reversed logically and legally followed.

The judgment of the appellate court, by inadvertence, no doubt, adjudged costs in favor of the appellee against the appellant city, and awarded execution therefor. The city is not liable for costs accruing in the case. City of Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837. The judgment of the appellate court awarding costs against the appellant city, and directing the issuance of execution and fee bill therefor, is reversed; otherwise, the judgment appealed from is affirmed. Judgment reversed in part.

Same—Same—Costs—Liability of City.

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NOTE.

**Prosecutions for Violations of Ordinances—Costs—Liability of Municipality.**—In the absence of a statutory provision on the subject, a municipal corporation cannot be held liable in any event for costs incurred in prosecuting for violation of its ordinances. City of Pekin *v.* Dunkelbury, 40 Ill. App. 184; Petersburg *v.* Whitnack, 48 Ill. App. 663; City of Selma *v.* Stewart, 67 Ala. 338; Town of Nakomis *v.* Harkey, 31 Ill. App. 107.

CITY OF BAINBRIDGE

*v.*

REYNOLDS.

(*Supreme Court of Georgia, Aug. 9, 1900.*)

**Ordinances—Enjoining Prosecution for Violation—Equity Jurisdiction.**—A court of equity will not, by injunction, prevent the institution of a prosecution for the violation of a penal municipal ordinance; nor will it, upon petition for an injunction of this nature, inquire into the validity of such an ordinance, upon constitutional or other grounds.

(Syllabus by the Court.)

ERROR by defendant from Decatur county superior court. *Reversed.*

*Hawes & Hawes*, for plaintiff in error.

*Albert H. Russell* and *M. E. O'Neal*, for defendant in error.

FISH, J. The plaintiff, alleging that he was a resident of the city of Bainbridge, and the agent in that city of a nonresident steam laundry, applied for an injunction to prevent the municipal corporation, its officers and agents, from enforcing or attempting to enforce a city ordinance which required the "agent or agents or representatives of each nonresident steam laundry" to pay a special license of $100. He alleged that the ordinance was "unconstitutional, null, and void"; that it was violative of both the constitution of this state and the constitution of the United States; that the city had no authority, under its charter, to enact the same; that it was unreasonable, etc. The case was heard in the court below simply upon the pleadings, and the court granted a permanent injunction, as prayed for, whereupon the defendant excepted.

*See notes at end of case.

It appears from the record that the ordinance in question imposes upon the agent or agents or representatives of each nonresident steam laundry a special license of $100, and then, in respect to its enforcement, simply provides "that any violation of this ordinance shall be punished as prescribed in section 260 of the City Code." While it may be inferred from the passage of the ordinance, and the admissions contained in the answer of the defendant as to the purpose for which it was enacted, that the municipal corporation does intend to attempt to enforce this ordinance against the plaintiff, how it will attempt to enforce it, or in what way it can enforce it, does not appear, either from the petition of the plaintiff, the answer of the defendant, or from anything else in the record, except as may be inferred from the ordinance itself. As the ordinance, in respect to the means provided for its enforcement, appears to be purely penal in character, we must presume, from the record, that the plaintiff was seeking, by injunction, to prevent the institution against himself of a prosecution under its penal provisions. The case, therefore, as it is presented to us, is controlled by the decision in Paulk *v.* City of Sycamore, 104 Ga. 24, 30 S. E. 417, 41 L. R. A. 772, and the previous decisions of this court therein cited. In that case it was held that: "Courts of equity will not, by injunction, prevent the institution of prosecutions for criminal offenses, whether the same be violations of state statutes or municipal ordinances; nor will they, upon petition for an injunction of this nature, inquire into the constitutionality of a legislative act, or the validity or reasonableness of an ordinance making penal the act or acts for the doing of which prosecutions are threatened." Accordingly, as the ordinance involved in the present case is, with reference to the means provided for its enforcement, purely penal in its nature, the court below had no power, upon an application for an injunction against its enforcement, to inquire into its validity, either upon constitutional or other grounds, and to enjoin the city from attempting to enforce it. If the ordinance is invalid, by reason of its unconstitu-

Notes

tionality, or for other cause, such invalidity would be a complete defense to any prosecution that might be instituted for its violation. Judgment reversed. All the justices concurring.

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NOTES.

**Whether Prosecutions for Violations of Municipal Ordinances May Be Enjoined.**—A prosecution under a municipal ordinance will not be enjoined in order to test the validity of the ordinance, if there is a remedy by appeal, or other adequate remedy at law. Foreheimer *v.* Port of Mobile, 84 Ala. 127; Waters Pierce Oil Co. *v.* Little Rock, 39 Ark. 412; New Home Sewing Mach. Co. *v.* Fletcher, 44 Ark. 139; Garrison *v.* Atlanta, 68 Ga. 64; Pope *v.* Savannah, 74 Ga. 365; Des Plaines *v.* Poyer, 123 Ill. 348; Geartside *v.* St. Louis, 43 Ill. 47; Yates *v.* Batavia, 79 Ill. 500; Schwab *v.* Madison, 49 Ind. 329; Dodge *v.* Council Bluffs, 57 Iowa 560; Brown *v.* Catlettsburg, 11 Bush (Ky.) 435; Hottinger *v.* New Orleans, 42 La. Ann. 629; Kansas City Cable R. Co. *v.* Kansas City, 29 Mo. App. 89; Banking Co. *v.* Jersey, 12 N. J. L. 258; Morris Canal, etc., Co. *v.* Mayor, etc., of Jersey City, 12 N. J. Eq. 252; Davis *v.* American Soc. for Prevention of Cruelty to Animals, 75 N. Y. 362; Marvin Safe Co. *v.* New York, 38 Hun (N. Y.) 146; West *v.* Mayor, 10 Paige (N. Y.) 539; St. Peter's Episcopal Church *v.* Washington, 109 N. Car. 21.

**Where No Adequate Remedy at Law.**—Where a municipal ordinance is void and in violation of property rights, and there is no adequate remedy at law, a prosecution under it may be enjoined. Montgomery *v.* Louisville & N. R. Co., 84 Ala. 127; Taylor *v.* Pine Bluff, 34 Ark. 603; Atlanta *v.* Gate City Gaslight Co., 71 Ga. 106; Louisville *v.* Gray. (Ky.) 1 Litt. 147; Newport *v.* Newport & C. Bridge Co., 12 Ky. L. Rep. 39; Rushville *v.* Rushville Nat. Gas. Co., 132 Ind. 575; Baltimore *v.* Radecke, 49 Md. 217.

And it has been held that where the invalidity of an ordinance has been established by a judicial decision on appeal from a conviction for its violation, its enforcement may be enjoined in order to prevent a municipality of prosecutions under the ordinance. Taylor *v.* Pine Bluff, 34 Ark. 603; Marvin Safe Co. *v.* Mayor, 38 Hun 146.

But in Medical & S. Inst. *v.* Hot Springs, 34 Ark. 559, the court refused to enjoin a prosecution for the violation of an ordinance prohibiting drumming, although the invalidity of the ordinance had been established by a previous decision of the same court.

In Shinkle *v.* Covington, 83 Ky. 420, an injunction was granted to restrain the enforcement of an ordinance imposing a fine for each

day's occupation of the street, but the amount of fines was not sufficient to give the right of appeal, and defendant claimed a right of property in the street, and the prosecution was restrained only until this right could be determined.

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## STATE *ex rel.* WHEELER *et al.*

*v.*

## DISTRICT COURT OF RAMSEY COUNTY *et al.*

(*Supreme Court of Minnesota, June 25, 1900.*)

**Paving Street—Local Assessments—Uniformity—Conclusiveness of Findings.**—In a proceeding instituted under the charter of the city of St. Paul to obtain judgment for the amount of an assessment on account of paving a street, the court found from the evidence that it was the finding and judgment of the board of public works, which board makes the assessment in the first instance, that the real property abutting upon that part of the street which was to be paved was specially benefited, at least, to the extent of the entire cost; that such benefit was wholly confined to such abutting property; and that all of said property (that is, each lot) was uniformly and equally benefited per front foot. On this finding or judgment said board assessed the cost of the improvement upon the abutting property uniformly and at the same amount for each foot of lot frontage. It is not contended that this finding is unsupported by the evidence. In view of the finding and judgment, and the rule established in a number of cases in this court as to the conclusiveness of the same, it is *held* that the claim of counsel that the assessment was made arbitrarily upon a front-foot basis, and without regard to benefits, is without foundation; and it is *held*, further, that the conclusive character of this finding and judgment is not affected or overturned by the mere fact that in making the assessment the board ignored the fact that the improvement did not include the paving of street intersections on the south half of the same, but did include such cost as to all intersections on the north half, or, in other words, by the mere fact that the intersections first mentioned were, for some unexplained reason, not paved under this contract, while those last mentioned were paved.

State *v.* District Court of Ramsey County

**Same—Same—Presumptions—Conclusiveness of Action of Board of Public Works.**—The presumption is that the board of public works has exercised its proper judgment in levying an assessment for any particular local improvement, and until something appears in the record itself which amounts to and demonstrates a mistake of fact, and of an affirmative nature, by way of evidence to the contrary, the action of the board is final and conclusive, except in case of fraud, or when it appears that an illegal principle or erroneous rule of law has been applied.

**Same—Same—Deductions—Street Railway Track—Objections.***—It was admitted at the trial that the street-railway company occupied the street with a single track for a distance of about 300 feet, and that no deduction on the assessment had been made on account thereof. *Held* that, to make the point available, it was, at least, essential for the objectors to show that the company, when obtaining the right to use the street, had agreed to pave that part over which it actually ran its cars.

**Same—Repairs and Maintenance—Collection of Fund.**—Under the guise of paying the cost of constructing a pavement, a municipal corporation cannot collect a fund in advance, to be used at some indefinite time, for the repair and maintenance of such pavement.

**Same—Same—Construction of Contract.**†—The contract in question, for paving the street and keeping it in repair, examined, and the agreement to repair construed to be nothing more than a guaranty of the quality of the workmanship and material, and not a general obligation to make repairs, irrespective of the causes making repairs necessary.

**Same—Local Assessments—Continuing Power.**‡—Unless restrained by the charter under which the power to impose special assessments upon property specially benefited thereby is conferred upon a municipal corporation, that power is not exhausted when one improvement is made. It is a continuing power, and whenever its exercise again becomes necessary, by reason of the destruction or inutility of the original improvement, it may again be exerted. This rule is applicable to the city of St. Paul, which is empowered by its charter, and without limitation, to make assessments upon specially benefited property for the cost of "paving" any street, levee, alley, or highway.

**Streets—Authority to Repave—Charters and General Rule.**—The fact that the charters of one or more cities in this state expressly

*See notes at end of case.

†See City of Kansas City *v.* Harson (Kan.), 2 Mun. Corp. Cas. 700, and *note*, 703.

‡See *notes*, 3 Mun. Corp. Cas. 279 *et seq.*

grant authority to "repave" as well as to "pave" cannot be accepted as conclusive proof that the legislature intended to abrogate the general rule, as above stated, in cities where the charters are silent on the subject of repaving.

(Syllabus by the Court.)

CERTIORARI from Ramsey county district court. *Writ quashed, and case remanded.*

*B. H. Schriber* and *Ambrose Tighe*, for relators.

*Jas. E. Markham* and *F. H. Griggs*, for respondents.

*H. F. Stevens*, *Harold Harris*, *Thomas J. Wheeler*, *W. T. McMurran*, and *Edwin Gribble*, for certain relators.

COLLINS, J. 1. In the brief of appellants' counsel we find the following clear and concise statement of this case, and of the objections on which they rely. As it cannot be improved upon, we incorporate it bodily into this opinion: Case Stated. "This is a proceeding instituted by the city treasurer, under the provisions of the charter, to obtain judgment against certain real estate for the amount of an assessment made by the board of public works of the city of St. Paul on account of the paving with asphalt of Cedar Street from the north line of Second street to the north line of Summit avenue. The objections in the court below were all tried together as one case, the several objectors uniting in the argument, and they all attack the assessment and resist the application for judgment upon the same grounds. The grounds for their attack, briefly stated, were and are as follows: (1) It conclusively appears that the board of public works made an arbitrary front-foot assessment, without regard to benefits: (a) The streets intersecting Cedar street were benefited by the improvement, and these intersections should have been considered as property, and should have been assessed their proportionate share of the cost; (b) all street intersections between Eighth street and Summit avenue were paved in the making of this improvement, and none were paved between Eighth and Second streets. (2) The cost of paving street intersections should have been partially

borne by property abutting on the intersecting streets. (3) The St. Paul City Railway Company should have borne a portion of the cost of the pavement, because (a) a portion of their right of way was paved, and this was a benefit; (b) this was provided for in the contract. (4) The contract and the amount assessed provided for repairing Cedar street for a term of ten years, and this was unauthorized, and no authority in law can be found to compel property owners to pay for repairs before the necessity therefor can be shown to exist. (5) This was, in fact, a repavement, and no authority exists under the charter to assess for a repaving." The position finally taken by counsel, and obviously correct, if these objections are well taken, is that the proceeding is the taking of property without due process of law, and is repugnant to the fourteenth amendment of the constitution of the United States.

2. Taking up these objections seriatim, we are to first inquire whether, from the return made by the court below, which contains none of the oral testimony there received, it appears, as asserted, that the board assessed for the cost of the improvement upon the front-foot plan or basis, and without regard to benefits. This improvement consisted in paving with asphalt the street known as "Cedar," as before stated, from Second street, near the Mississippi river, to Summit avenue, —a point near the new capitol site; the pavement being of a uniform width, and 7,354 feet in length. Of this there was a total lot frontage of 6,034 feet, and a total street frontage, by reason of intersecting streets, of 1,320 feet. The assessment was uniform per front foot against each lot abutting on Cedar street from one end of the improvement to the other, and no other lots were assessed. It amounted to $5,396 per foot of lot frontage,—a trifle less than $5.40 a foot; and, of course, if we multiply the number of feet by the amount of the assessment per foot, we obtain as a result a sum exactly equal to the total cost of the improvement as fixed in the contract with the party who did the work. But the fact that the assess-

Paving Street—Local Assessments—Uniformity—Conclusiveness of Findings.

ment was uniform per front foot as against each abutting lot does not demonstrate, nor does it tend to prove, that the assessment was made without regard to benefits. Its tendency is to show that each and every lot along the entire improvement was benefited equally and exactly the same per front foot, and hence that the assessment should be precisely the same. The state constitution (article 9, § 1), as amended in 1881, authorizes the enactment of general or special laws with reference to assessments for local improvements, and the charter provisions under which such assessments are made in St. Paul are that an assessment may be made for local improvements upon property fronting upon said improvements, or upon the property benefited thereby; that such assessment may be made for grading, filling, leveling, paving, curbing, walling, bridging, graveling, macadamizing planking, opening, extending, widening, contracting, altering, and straightening any street, levee, alley, or highway; that "the expenses of any improvements mentioned in the foregoing section shall be defrayed, save as herein provided, by an assessment upon the real estate benefited thereby, or by an assessment upon the real estate fronting thereon"; and that such real estate must be assessed as nearly as may be in proportion to the benefit resulting thereto. See City of St. Paul Municipal Code 1893, §§ 95–97, 116. When we turn to the return in this case, we find that the lower court has found and certified that: "Upon the trial the members of the board of public works of the city of St. Paul were called as witnesses, and testified as to the manner in which the assessment under consideration was made; and it appeared from their testimony that, in their judgment, the property specially benefited by the improvement under consideration was confined wholly to the various lots and tracts of land abutting upon said Cedar street, between the north line of Second street and the north line of Summit avenue, and the board so determined, and found that this property was specially benefited, at least, to the extent of the cost of the entire improvement, including the incidental cost of levying and collecting

the assessment. This frontage, not including street intersections or abutting streets, was shown to amount, in all, to a total of six thousand thirty-four and 1/100 (6,034 1/100) lineal feet; and the board proceeded to apportion the entire amount of said assessment of benefits, being the entire cost of the improvement, to said total lot frontage, so that the amount assessed against each lineal foot of each of said several lots and parcels of land was the amount of $5.396 per front foot, the board having duly determined that all of said property was equally benefited specially by said improvement." And this finding is to be construed and conceded with reference to what has been repeatedly held, as was said in State v. District Court, 68 Minn. 242, 71 N. W. 27: "That, under the charter of the city of St. Paul, the judgment of the board of public works as to what property is benefited, and as to how much it is benefited, is final and conclusive, and cannot be reviewed by the courts, unless it is shown to be fraudulent in fact, or to have been made up upon a demonstrable mistake of fact, or that in making it the board of public works applied an illegal principle or an erroneous rule of law." The board found that the property specially benefited by the improvement was wholly that abutting upon that portion of Cedar street which was to be improved; that this property was specially benefited, at least, to the extent of the cost thereof, including the incidental cost mentioned; and that all of said property was equally benefited by said paving. This judgment and determination of the board is, as we have seen, final and conclusive, unless it is shown to be fraudulent in fact, or made up on a demonstrable mistake of fact, or that in making it the board applied an illegal principle or an erroneous rule of law. We have already stated the position of counsel as to this, in substance: First, that all intersecting streets should have been considered as property benefited by the improvement, and should have been assessed accordingly; second, that the intersections actually paved were a special benefit to inter-

secting streets, and lots in those streets should have paid their proportionate share of the cost of paving these intersections; third, that in any event, the corner lots which abut both on Cedar street and the intersecting streets, where the intersections were paved, should pay a greater proportion of the cost of the improvement than lots which have a frontage on Cedar street only, and that it was error for the board of public works, in making the assessment, to ignore the fact that the cost of improvement did not include the paving of intersections upon the south half of the improvements, or all south of Eighth street, and did include the cost of paving all intersections on the north half of the improvement, or from Eighth street to Summit avenue, both inclusive. Now, the answer to all this, with the exception of what may be considered as a single point, is that, on the oral testimony received at the trial below, the court found against the objectors, and that the property benefited to the full amount of the cost of this improvement was that, and that only, against which the board assessed the cost thereof. Evidently it was not made to appear at the trial, and surely it has not been shown by anything we find in the record, that as to intersections at streets, which intersections were paved under this contract, or lots which cornered on these streets and Cedar street, or as to property which abutted on these intersecting streets only, not on Cedar, there was any demonstrable mistake of fact in making the assessment entirely against the Cedar street property, or that the board applied any illegal principle. And it has not been suggested that when making the assessment the board acted fraudulently, or applied an erroneous rule of law.

We have excepted one point made by counsel from the foregoing statement. A plat of the improvement, known as the "Scale Plan," was introduced in evidence below, and has been made a part of the return here. It appears from this that the paving commenced at the west line of Second street.

No part of the intersection with Second street was paved. Nor were the intersections, north, with Third, Fourth, Sixth, and Seventh streets paved under the contract. Fifth street and all others north of Seventh (several in number) were wholly paved. Because of this fact, which appears from the plat, and the further fact that the assessment was uniform per front foot along the entire improvement, objectors' counsel insist that it is shown and demonstrated to a mathematical certainty that there was a mistake of fact which vitiated the entire assessment; in other words, that there was a demonstrable mistake when the board ignored the fact that the cost of the improvement did not include the paving of intersecting streets upon the south half of the improvement, and did include the paving of intersecting and abutting streets on the north half thereof. The presumption is that the board of public works has exercised its proper judgment, even though it has apparently indulged its discretion, in levying the assessment for any particular local improvement; and until something appears in the record itself which amounts to a demonstrable mistake of fact, and of an affirmative nature, by way of evidence to the contrary, the action of the board is final and conclusive, except in case of fraud, or where it appears that an illegal principle or an erroneous rule of law has been applied. There is nothing before us which indicates why the intersections upon the south half of Cedar street were not included in the contract, and paved with the remainder of that thoroughfare. We cannot presume that such intersections were and are unpaved; for we have no right to assume that, in making this improvement, Cedar street was left incomplete, unfinished, and unpaved where it crossed the streets before mentioned. To give weight to the suggestion that at some time in the future these intersections will have to be paved, wholly or in part, at the expense of the owners of the abutting corner lots already assessed for the improvement, we should, in fact, be assuming that these intersections were and are unpaved, which, as before stated, we

Same—Same—Presumptions—Conclusiveness of Action of Board of Public Works.

cannot do. And probably we have no right to assume that these intersections were paved when this improvement was ordered, and for that reason paving at these points was unnecessary. Buf if we had this right, and could so assume, in the absence of proof, we could not go further, and assume, as we would be obliged to do, that a part or all of the cost thereof had been borne by the owners of the lots now proceeded against. More than this, as against the finding as to benefits, we have the fact, only, that, for some unexplained reason or cause, the contract based upon the scale plan we have mentioned did not include and cover the paving of about half of the intersections with other streets. This fact alone cannot be permitted to overcome the presumption arising from the finding that there was evidence which justified the board in concluding that the lots on the south half of the improvement were in fact benefited equally with those on the north half, although intersections were not included in the paving plan on the south half, but were on the north. The fact on which counsel rely, standing alone and by itself, does not, as counsel argues, conclusively demonstrate that the assessment was made either upon a mistake of fact, or upon an arbitrary front-foot basis, and with a total disregard as to special benefits for each particular lot. Counsel might have shown by proper evidence that, in assessing each lot of the same width the same sum, there was inequality which would vitiate the assessment, because intersections on one half of Cedar street were provided for, while those on the other half were ignored. They might have shown by satisfactory proof that the lots abutting on the south half were not specially benefited per front foot to the same amount as were those abutting on the north half, because of the condition of those intersections. But nothing of the kind appears to have been attempted. From the return to the court below, it was made to appear that the board carefully considered the assessment district, which was to be laid out by them, and that, in their judgment, the only property to be included in it, as specially benefited, was that fronting upon Cedar

street, and also that the board duly determined that all the property was equally benefited, specially, by the improvement, at least to the extent of the expense incurred. To enable these objectors to succeed in their contention on this point, it was essential that the inequality of the assessment be made to appear in some other manner than by the introduction of the plan or plat. That alone does not overcome and overturn the finding, for there may have been an abundance of reasons for determining that all of the property abutting on this improvement was equally and uniformly benefited. As is said by counsel for the city: "It is immaterial, then, that the assessment figures out to an equal amount for each foot of property fronting on the street. Once the board had determined that all property fronting on the street was specially and equally benefited, the only rule which would be even arithmetically correct, by which the ratio of responsibility could be determined, would be the front-foot rule. To say that all property is benefited alike per front foot is not in itself any more erroneous than to say that two pieces of property are benefited alike per front foot."

3. The point that the exemption of the street-railway company from any share of the cost of the improvement vitiated the assessment might have been of some importance, if the objectors had shown that such company occupieCedar stree ıı ( ( an agreement to pave any part thereof. The occupation, and that no deduction had been made on account thereof, stood admitted; but, under the contract, there was to be no diminution because of such occupancy, unless the railway company agreed, when accepting a grant from the city of the right to occupy, to pave that portion of the street over which it actually ran its cars. To make the point available, it was, at least, essential for the objectors to prove such an agreement. It could not be inferred from the mere fact of occupancy.

Same—Same—Deductions—Street Railway Track—Objections.

4. It is contended that the contract for the improvement embraces within its terms an independent agreement to main-

tain and keep the street in repair for a period of 10 years, and for this reason the assessment cannot be sustained. The provision of the contract on which this much of the objectors' argument is based is as follows: "It is expressly agreed that the said party of the first part shall and will, and do hereby, guaranty the asphalt pavement constructed under this contract for a period of ten years from the date of the completion of the work hereinbefore provided for, and its acceptance by the board of public works of said party of the second part, and said party of the first part shall keep said asphalt pavement in good and sufficient repair during said period of ten years, repairing the pavement wherever settlement or irregularities causing a variation in surface of three-eighths of an inch or over, measured within the length of a four-feet straightedge, or any cracks thereof three-eighths of an inch or over in width, or which show disintegration from any cause whatever, occur, and at the end of said period of ten years to turn over said pavement to said city in good order and condition, making all necessary repairs as specified above, and that if, during said period, it should be demonstrated that the material is defective, from overburning or improper mixing, or any other preventable cause, or that the workmanship has been done in an unskillful manner, the party of the first part shall, at its own cost and expense, upon the order of the board of public works, entirely remove any defective portion of the asphalt surface, and replace the same to the satisfaction of said board of public works; and the said board shall be the sole judge whether or not said pavement is in good and sufficient order and condition during and at the end of said term; and if at any time within the period at which the pavement is guarantied by the party of the first part as above specified, the said pavement shall, in the judgment of the board of public works, require to be repaired, the said party shall, through the engineer and clerk, notify the party of the first part to make the repairs required; and, if said party of the first part shall neglect to make such re-

Same—Repairs and Maintenance—Collection of Fund.

pairs within six days after the day of the service of such notice, then said party shall have the right to cause such repairs to be made in such manner as they deem best, and the whole cost thereof shall be paid out of the special fund hereinafter named. It is further expressly agreed that for the purpose of assuring the performance of the work to be done under this contract, and the performance of the guaranty of keeping said pavement in good and sufficient order and condition for the term of years for which it is guarantied after its completion and acceptance by the board of public works, the said party of the second part will retain fifteen (15) per cent. of the entire cost of the improvement for ten years from the date of the completion and acceptance of the work, and the amount so retained shall be kept by the party of the second part." In the specifications attached to the contract, and made a part thereof, were similar provisions, and also "that, whenever any repairs are made necessary from construction or repair of sewers, or sewer connections, the laying of water or gas pipes, or water or gas connections, or repairs thereto, or telegraph wires under the street, or repairs thereto, and for repairs of any of the same, or from any disturbances of the pavement by parties acting under permits issued by the city or its authorized agents, or from other causes not due to defective material or workmanship, the contractor, on notification from the engineer of the board of public works, shall make all the necessary repairs in conformity with the specifications for this class of work. And, to this end, it is further agreed that the contractor shall have the right, and it shall be his duty, upon notice from, and under the direction of, the engineer of the board of public works, to make all repairs which become necessary by the construction of any of the public improvements above referred to, or by work done by private parties under permits issued by the city, during the period of said guaranty, or by other causes named above. The cost of all such work or repairs as referred to in the preced-

ing paragraph, which shall be done on said street after the completion of said contract work and its acceptance by the city, shall be paid for by the party or parties in whose interest and for whose benefit such work or repairs shall be done, and at a price not to exceed ten per cent. in addition to the original cost per square yard of said pavement." The city charter authorizes the letting of a contract for paving and for repairs, and the levy of an assessment for the cost thereof, in one and the same proceeding. Municipal Code, *supra*, § 96; State *v.* District Court, 47 Minn. 406, 50 N. W. 476. It seems to be conceded here that, if the contract goes no further than to provide a reasonable guaranty for good material and workmanship, it may be upheld, but that if in fact it must be construed as imposing upon the owners of abutting lots the burden of repairs and maintenance for the term of ten years by actually, although indirectly, including the cost of repairs and maintenance for such a term in the original cost of construction, the assessment cannot be sustained, because the property owners would be compelled, not only to pay for the paving, but a sum in advance and in addition, for 10 years' repairs and maintenance. Under the guise of paying the cost of construction, the city, according to all of the authorities, cannot collect a fund, to be used at some indefinite time in the future for repairs and maintenance. If repairs become necessary, or if money must be expended in maintaining the pavement after its completion, the city must provide as the occasion arises and requires,—not when constructing, and when no one can foresee what may be demanded or when. See City of Portland *v.* Paving Co., 33 Or. 307, 52 Pac. 28, 44 L. R. A. 527; Verdin *v.* City of St. Louis, 131 Mo. 26, 33 S. W. 480, and 36 S. W. 52; Fehler *v.* Gosnell, 99 Ky. 380, 35 S. W. 1125; Boyd *v.* City of Milwaukee, 92 Wis. 456, 66 N. W. 603; Brown *v.* Jenks, 98 Cal. 10, 32 Pac. 701,—as cases in which contracts and assessments for local improvements have been held, and clearly were, within the inhibition, and therefore

invalid. But if there was in this instance a mere guaranty of good material and workmanship, and if that is all these particular portions of the contract amounted to when properly construed, the latter may be upheld, and the assessment sustained. So it is a question of construction. The city had the right to secure by means of a guaranty, with sufficient protection for its fulfillment, a pavement which would prove firm and durable, not for all time, but for a reasonable time,—during what could be called its "life." It certainly could specify and guard against cracks or depressions which would of themselves show, if occurring within a certain period, that there was defect in either materials or workmanship. It could also protect itself against disintegration which in itself might well be considered evidence of poor materials or defective workmanship. Let us see if anything more than this was done, with a fair construction of the contract. We find that the contractor guarantied the pavement for 10 years from the date of its completion, and that it would keep the same in good and sufficient repair for the period of 10 years, wherever settlements or irregularities caused a variation in the surface. It is quite evident, when such a variation appeared, that there was something wrong with the construction. Again, if cracks of a certain size occurred, the contractor was to repair. Surely a crack of this size could be attributed to defective materials or imperfect work. While the clause concerning repairs in case of disintegration simply provided that if any settlement, irregularity, or crack occurred, which showed (that is, was the result of) disintegration, from any cause, the contractor was to repair it, and thus comply with its proper and permissible guaranty. All disintegrations were not provided for, as argued by counsel for the objectors; nor did the contractor stipulate that it would repair the pavement in all cases of disintegration. The argreement was simply to repair all settlements and irregularities which had caused a surface variation of three-fourths of an inch or

Same—Same—Construction of Contract.

more, and all cracks occurring which show disintegration. In effect, there is a guaranty that there shall be no disintegration for 10 years on account of defective construction. This part of the contract cannot be construed as requiring the contractor to repair and replace in every instance of injury or removal, without regard to the cause thereof. To construe a contract to repair as imposing upon the contractor the duty of repairing in all cases and under all circumstances would require very plain and unambiguous language. That which we have just considered falls far short of it. This is made clearer and more certain in stipulations, immediately following, for repairs which are made necessary because of defective workmanship or material, and are to be made at the contractor's expense, and other stipulations wherein disturbances of the pavement for legitimate purposes, or other disturbances "not due" to defective material or workmanship, are provided for. We are of the opinion that this part of the contract was nothing more than a perfectly proper guaranty, with provisions for its enforcement. It is in all essentials the same as the contracts considered and upheld in Paving Co. *v.* Hezel, 76 Mo. App. 135, 1 Mo. App. Rep'r 504; Same *v.* Ullman, 137 Mo. 543, 38 S. W. 458; Wilson *v.* City of Trenton, 60 N. J. Law 394, 38 Atl. 635; Robertson *v.* City of Omaha, 55 Neb. 718, 76 N. W. 442; Osborne *v.* City of Lyons, 104 Iowa 160, 73 N. W. 650; Cole *v.* People, 161 Ill. 16, 43 N. E. 607; City of Schenectady *v.* College (Sup.), 21 N. Y. Supp. 147; City of Kansas City *v.* Hanson, 60 Kan. 833, 58 Pac. 474.

Same—Local Assessments—Continuing Power.

5. It is urged that the improvement in question is a repavement, and for that reason the city is without authority to levy an assessment upon benefited property for the cost of construction. The finding of the court was that in 1887 Cedar street was paved with cedar blocks upon a plank foundation, the property footing thereon being assessed its proportionate share of the cost. This assessed property included that of the present objectors. It was also found that this pavement

had become worn out, decayed, rotten, and unfit for public use, and was at the time this proceeding was instituted in such a worn-out and dilapidated condition as to necessitate the repaving of said street in order to put the same in suitable condition as a public street. Authority for the present assessment is found in the charter, if anywhere,—in that part of the Code, *supra* (section 96), which reads: "Such assessments may be made by said city of St. Paul for grading, filling, leveling, paving, curbing, walling, widening, contracting, altering and straightening any street, levee, alley or highway." Repaving is not expressly mentioned in this provision, but that it shall be is not important, under the authorities. The power to pave is given, and upon the exercise of this power no limitation has been imposed in the charter. There is no reason, therefore, why it should not be regarded and held to be a continuing power, which is not exhausted by its past exercise, but may be exercised from time to time whenever the public good requires it. The approved rule is that, unless restrained by the charter under which the authority to impose special assessments is granted, that power is not spent when one improvement is made. It is a continuing power, and, whenever its exercise becomes again necessary by reason of the destruction or inutility of the original improvement, it may be again exerted. State *v.* City of Hoboken, 45 N. J. Law 482; Gurnee *v.* City of Chicago, 40 Ill. 165; Estes *v.* Owen, 90 Mo. 113, 2 S. W. 133; 2 Dill. Mun. Corp. § 686; 24 Am. & Eng. Enc. Law, pp. 43, 44, and cases cited in notes. The doctrine stated was approved and applied by this court in Karst *v.* Railroad Co., 22 Minn. 118, where it was held that general authority in a charter to establish the grade of a street was a continuing one, to be exercised as often as the public good required it. It is true that in Pennsylvania this rule has not been adopted, the leading case being Hammett *v.* City of Philadelphia, 65 Pa. St. 146; but in its position that state stands substantially alone. Counsel also call attention to the fact

that, by the charters of Minneapolis and some other cities, the power to repave is expressly given, and thereupon inquire, "Is further evidence needed that 'paving' and 'repaving' are not synonyms, as used in Minnesota legislation?" The fact that one charter confers the right to pave and to repave, while the other is silent as to repaving, proves nothing, except that more caution was taken by the local members of the legislature from one city than by those of the other. The power of the city of St. Paul to compel a repavement of one of its streets at the expense of the owners of the property specially benefited thereby is not to be determined by the provisions of the charter of another city, but by what we find in its own charter. We cannot infer from the fact that assessments for repavements were expressly provided for in some charters, while nothing was said in others, that a marked and important distinction was intended on this subject.

Streets—Authority to Repave—Charters and General Rule.

Attention was called during the argument to the case of Village of Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, as announcing the principle that all special assessments made on the basis of frontage are in violation of the fourteenth amendment to the federal constitution. That is not a fair construction of the decision. A very full and very able review of the case, and others in the supreme court of the United States on this subject, may be found in Webster *v.* City of Fargo (N. D.), 82 N. W. 732. See, also, current volume of Harvard Law Review (volume 14, pp. 1, 98).

We quite agree with counsel in their assertion that under municipal charters, and in all cases where the cost of an improvement may be levied upon the owners of specially benefited property, the burden is a very serious one, and borders very near upon confiscation. But these charter provisions are self-imposed, and, if wrong, there is an adequate remedy in the hands of those interested. The courts cannot relieve those who are unfortunate in having property to be

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assessed. At most, we can insist upon compliance with the statute in all matters of detail, in order to levy and collect. We are of the opinion that there was a compliance in this case, as the record now stands. Writ quashed, and case remanded.

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NOTES.

**Local Assessments—Liability of Street Railways.**—In the absence of a charter or other exemption, a street railway in a public street is liable to local assessments where it is specially benefited by improvements. Birmingham *v.* Klein, 89 Ala. 461; Appeal of North Beach & Mission R. R. Co., 32 Cal. 499; New Haven *v.* Fair Haven & W. R. Co., 38 Conn. 422; Kuehner *v.* Freeport (Ill.), 17 L. R. A. 774; Chicago *v.* Baer, 41 Ill. 306; Troy & Lansingburg R. Co. *v.* Kane, 9 Hun (N. Y.) 506.

**Paving Street.**—The paving of the street in which a street railway is laid has been held to be such a benefit as to render the railway liable to a local assessment. New Haven *v.* Fair Haven & W. R. Co., 38 Conn. 422, 3 Am. Ry. Rep. 230; Chicago *v.* Baer, 41 Ill. 306.

But where a street-railway company is required to pave that portion of the street used as its roadbed, it is not liable to local assessments for improving the rest of the street. Chicago, etc., R. Co. *v.* Chicago (Ill.), 27 N. E. Rep. 926; Chicago *v.* Sheldon, 9 Wall. (U. S.) 50.

**Widening Street.**—The widening of the street in which a street railway is laid is a benefit rendering the railway liable to a local assessment. Parmelee *v.* Chicago, 60 Ill. 267; Chicago City R. Co. *v.* Chicago, 90 Ill. 573.

The franchise, right of occupancy, and right of way of a street railway are liable to local assessments, if benefited by the widening of the street in which the track is laid. Chicago City R. Co. *v.* Chicago, 90 Ill. 573.

**Whether Tracks Real Estate.**—The track of a street railway, when laid in the usual manner, is real estate, and liable to an assessment for the cost of paving the street. New Haven *v.* Fair Haven & W. R. Co., 38 Conn. 422, 3 Am. Ry. Rep. 230.

But the track of a street railway in a public street is not real estate within the meaning of section 3, tit. 1, subc. 7, of the charter of St. Paul, authorizing the levy of local assessments upon real estate. State *v.* Ramsey County Dist. Ct., 31 Minn. 354, 13 Am. & Eng. R. Cas. 419. The ground for this holding, however, was the peculiar language of the charter.

**Land Bordering on Street.**—In Oreilley *v.* City of Kingston, 114

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N. Y. 439, it was held that lands "bordering on or touching" a street, within the meaning of a charter authorizing assessments for street improvements, do not include land occupied in the street by a street-railroad company.

**Must Be Benefited.**—But street railways cannot be assessed for street improvements unless they are in fact benefited by the improvements. Farmers' Loan & Trust Co. *v.* Borough of Ansonia (Conn.), 23 Atl. Rep. 705; People *ex rel.* James *v.* Gilon, 126 N. Y. 640.

And it has been held that the company's roadbed must be benefit, benefits to its franchise not being considered. Davis *v.* Newark, 54 N. J. L. 144.

**Where Not Considered Benefited.**—A company had a double track in a street, and neither the spaces between the rails nor the spaces between the tracks were paved nor contracted to be. *Held*, that the board of public works might fairly be of the opinion that the company was not benefited by the paving of the rest of the street, and therefore might properly refrain from assessing the company towards the expense thereof. State *ex rel. v.* Ramsey County Dist. Court, 32 Minn. 181, 19 N. W. Rep. 732.

**Contract Exempting Railway.**—A contract with the city exempting a street railway from all assessments for local improvements, on condition that the company keeps the streets through which its tracks are laid in good order, is valid. Chicago *v.* Sheldon, 9 Wall. (U. S.) 50.

**New Pavements.**—It has been held that a street-railway company cannot be assessed for the cost of laying new pavements, as they, like the making of the street itself, are permanent improvements, the cost of which must be borne by the city. Montreal *v.* Montreal St. R. Co. (Ca.), 3 Montr. Super. 320.

**Validity of Assessment on Abutting Owner as Affected by Failure to Assess Street-Railway Company.**—See City of Shreveport *v.* Prescott (La.), 2 Mun. Corp. Cas. 370, and *note*, 409 *et seq.*

## ALAMEDA MACADAMIZING CO.

*v.*

## PRINGLE *et al.*

(*Supreme Court of California, Oct. 4, 1900.*)

**Street Improvements—Unauthorized Requirement of Guaranty Bond—Validity of Assessments.***—A provision in a contract for street paving which requires the contractor to "file a bond in the sum to be determined by the mayor, guarantying the work for one year from injury by ordinary use," where the contract is let under a statute which does not authorize that the assessments against abutting property for the cost of the improvement shall include the additional expense of repairs for one year, renders the contract and assessments for the cost of work performed under it void.

APPEAL by plaintiff from Alameda county superior court. *Affirmed.*

*James C. Martin* and *Johnson & Shaw*, for appellant.
*Duncan Hayne*, for respondents.

COOPER, C. This action was brought to foreclose a street-assessment lien under an assessment issued by the superintendent of streets of the city of Oakland. Defendants recovered judgment, and this appeal is by plaintiff from the judgment and order denying a new trial. It appears that the contract was let under the street law, and an ordinance duly adopted by the city, which provided, among other things, that all persons bidding for street work shall "file a bond in the sum to be determined by the mayor, guarantying the work for one year from injury by ordinary use." Was this specification authorized by the statute, and did it increase the burdens of the property owner? We think it was unauthorized by the statute, and that it increased the

*See generally, *note*, 1 Mun. Corp. Cas. 560. But see City of Kansas City *v.* Hanson (Kan.), 2 Mun. Corp. Cas. 700, and *note*, 703 *et seq.*

burdens of the property owner, and made the contract and assessment void. Brown *v.* Jenks, 98 Cal. 12, 32 Pac. 701; Burnett *v.* Llewelyn (Cal.), 32 Pac. 702. In the first case cited the provision required the contractor to give a bond "for keeping the streets so improved in thorough repair for the term of five years from the completion of the contract," and it was held that the provision was not authorized, and rendered the contract and lien void. In the opinion it is said: "The bond is not only unauthorized by the words of the statute, but by the requirement changes and may increase the burdens of the property owner. It is manifest that the obligation to keep the street in repair for five years is a burden which one would not undertake for nothing. Therefore a contractor would charge a higher price for the work when he was forced to contract also for repairs. The expense undertaken is indefinite, and the property owner must pay for them in advance, whereas the statute provides for repairs after the necessity for them appears. Then, it being contingent, he will be paying for repairs which may never be required."

It is said that the provision here only guaranties the work, and does not require the contractor to keep the streets in repair as was the case in Brown *v.* Jenks. But we are unable to draw any such nice shades of distinction. The contractor under the bond was bound "to guaranty the work for one year from injury by ordinary use." It is a self-evident proposition that the use of a paved or macadamized street by the traveling public for one year will injure it to some extent at least. The material of which the pavement is made may wear in places, break or become injured in others; and under this bond the contractor was required to either make the necessary and proper repairs himself, or the city could make them, and recover of him and his bondsmen the cost of such repairs. The amount of such injury, by ordinary use, is a matter of conjecture. It might be $1,000 or much more, but, whether more or less, the principel is the same. It could make no difference, in case the injury were $1,000,

whether the contractor should spend the $1,000 in making good the injury by repairing the street himself, or pay it to the city, and let the city spend it for the same purpose. Neither does the time make any difference. If a contract to keep in repair for five years is a burden upon the taxpayers, so is a contract to keep in repair for one year. Such contract is a burden in either case, although differing in degree. No contractor would undertake for nothing, after having fully complied with his contract, to guaranty the work "from injury by ordinary use" for one year. And no matter how carefully and conscientiously the contractor may have complied with his contract in every detail, so as to be entitled to all agreed to be paid him, he must, in addition to having so performed his contract, pay the wear and tear of the street by ordinary use for one year.

It is argued that the bond was required as a guaranty that the work would be well done, and that the bidder was responsible. The amount of the bond is not fixed by the ordinance, but is left to the arbitrary discretion of the mayor. He might require a very small bond of one bidder or class of bidders, and a very large one of some other bidder or class of bidders. But it is not necessary to decide as to whether or not the city council could delegate such authority to the mayor. The contention is fully answered in Brown *v.* Jenks where it is said: "Officers are provided and vested with the power and charged with the duty of seeing that such work is properly done. A bond cannot be substituted for the performance of this duty." We are unable to distinguish this case from the rule laid down in Brown *v.* Jenks.

It is claimed that a different rule has been adopted in other states. An examination of the cases cited has been made, and we fail to find any different rule in any state except where the statute is different from ours. The question has lately been discussed, and the authorities reviewed by the supreme court of Oregon in City of Portland *v.* Bituminous Pav. Co., 33 Or. 307, 52 Pac. 28, 44 L. R. A. 527, and the rule here adopted approved and followed. The court in

conclusion said: "It is clear that under the authorities, based upon what we believed to be sound reasoning, the assessment against property to meet the additional expense of such repairs was unwarranted by the charter." In this case we think it perfectly clear that the assessment against the property of defendants included the additional expense of the repairs of the street for one year by reason of all damages from injury by ordinary use. This must have been the view taken by all the parties when the bond in this case was prepared and approved by the mayor, for the condition there is "that the said company shall keep in good repair * * * for the term of twelve months from the completion and acceptance of the work." If the views herein expressed are correct, it is not necessary to discuss any other question in the case. We advise that the judgment and order be affirmed.

We concur: GRAY, C.; SMITH, C.

PER CURIAM. . For the reasons given in the foregoing opinion the judgment and order are affirmed.

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VILLAGE OF KENT

*v.*

DANA.

(*Circuit Court of Appeals, Sixth Circuit, February 12, 1900.*)

**Municipal Bonds—Ultra Vires—Bona Fide Holders—Recitals—Estoppel.***—It is not competent for a municipal corporation, having the power to issue bonds for the refunding of its indebtedness, and having exercised that power by passing an ordinance directed to that purpose, and issued in due form its negotiable bonds, reciting that they are issued in conformity with the statute, and that all the requirements of the law have been duly complied with, and that all the conditions precedent exist, to deny the validity of the bonds, on

*See note at end of case.

the ground that they were issued for an unlawful purpose, as against a *bona fide* holder thereof for value, who has taken them before maturity.

Same—Sufficiency of Recitals.—An Ohio statute authorizes the issue of municipal refunding bonds, and requires that they shall express upon their face the purpose for which they were issued, and under what ordinance. *Held*, that such requirement was fully met by recitals in such bonds, that they were issued under the authority of an ordinance passed on a certain day by the council of the defendant village, and for the purpose of procuring the necessary means to refund and extend the time of payment of certain outstanding general fund bonds heretofore legally issued by said village, which, from its limits of taxation, the said village is unable to pay at maturity.

Same—Action on Coupons—Parties.—Under a statute requiring that the suit shall be brought by the real party in interest, the fact that negotiable coupons detached from municipal bonds were delivered to the holder merely for the purpose of enabling him to bring suit upon them will not prevent him from maintaining a suit for the purpose of collecting them.

Same—Same—Recitals—Estoppel.—In such an action, whether or not the ordinance authorizing the issue of the bonds was operative when they were issued was immaterial, as it was recited in the bonds that "all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed in regular and due form as required by law."

ERROR to the circuit court of the United States for the Northern district of Ohio. *Affirmed.*

This action was brought by Edward Dana, who was the plaintiff in the court below, and who is the defendant in error here, to recover upon 75 interest coupons of $30 each, maturing, part of them, September 1, 1896, part March 1, 1879, and there mainder September 1, 1897. These coupons were originally attached to certain refunding bonds, being part of an issue of such bonds issued by the village of Kent, the defendant below, which is a municipal corporation in Portage county, Ohio. The bonds bear date March 1, 1892, and were numbered from 1 to 80, respectively, being for the sum of $1,000 each. The bonds are not yet due.

Case Stated.

The following is the form of one of the bonds and a coupon, as set forth in the petition, the several bonds and coupons differing only in the dates when they were respectively payable and in the number:

"United States of America.

"No.———. $1,000.

"State of Ohio. Portage County.

"Village of Kent.

"Refunding Bond.

"Know all men by these presents, that the village of Kent, in Portage county, state of Ohio, is indebted to and promises to pay the bearer the sum of one thousand dollars in lawful money of the United States of America, at the National Bank of North America, in the city of New York, on the first day of March, A. D. 19—, with interest thereon at the rate of six per cent. per annum, payable semiannually on the first day of March and September of each year, upon the presentation and delivery of the proper coupon hereunto annexed, signed by the village clerk, at the said National Bank of North America, in the city of New York. And the said village is hereby held and firmly bound, and its faith and credit and all the real and personal property of said village are hereby pledged, for the prompt payment of this bond and interest at maturity. This bond is one of a series of bonds of like date and tenor, issued for the purpose of procuring the necessary means to refund and extend the time of payment of certain outstanding general fund bonds heretofore legally issued by said village, which, from its limits of taxation, the said village is unable to pay at maturity. This bond is issued and executed under and by authority of and in accordance with an ordinance duly passed by the village council, February 15, A. D. 1892. And it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed in regular and due form as required by law. And it is also

certified that all statutory and constitutional provisions have been fully complied with in the creating of this indebtedness. In testimony whereof, we, the undersigned officers of the village of Kent, Ohio, being duly authorized to execute this obligation in its behalf, have hereunto set our official signatures, and caused the seal of said village to be hereunto affixed, this first day of March, A. D. 1892.

"[Corporate Seal.] C. B. Newton, Mayor,
"Frank Arighi, Clerk."

"30. No. 9.

"On the first day of September, 1896, the village of Kent, Portage county, state of Ohio, will pay the bearer thirty dollars, at the National Bank of North America, in the city of New York, being six months' interest due on refunding bond No. 1. Frank Arighi, Village Clerk."

The ordinance under which these bonds were issued was the following:

"An ordinance to provide for issuing of bonds of the village of Kent, Ohio, for the purpose of extending the time of payment of certain indebtedness, which from its limits of taxation, said village is unable to pay at maturity.

"Be it ordained by the council of the village of Kent, Ohio:

"Section 1. That for the purpose of extending the time of payment of so much of its existing indebtedness now due, and to become due, as said village is unable from its limits of taxation to pay at maturity, there be .issued the bonds of said village in the sum of eighty thousand dollars ($80,000) as hereafter provided.

"Sec. 2. That said bonds shall be of the denomination of one thousand dollars ($1,000) each, and shall be numbered from one to eighty, both inclusive, and shall bear date the first day of March, A. D. 1892, and shall become due and payable as follows, to wit: Ten thousand dollars March 1, 1915, ten thousand dollars March 1, 1916, ten thousand dollars March 1, 1917, ten thousand dollars March 1, 1918, ten thousand dollars March 1, 1919, ten thousand dollars March 1, 1920, ten thousand dollars March 1, 1921,

ten thousand dollars March 1, 1922. Said bonds shall bear interest at the rate of six per cent. per annum, payable semiannually, on the first day of March and September of each year, and the several installments of interest shall be evidenced by the coupons attached to said bonds, and both interest and principal shall be payable, as they severally become due, at the National Bank of North America, in the city of New York. Said bonds shall express upon their face the purpose for which they are issued, and that they are issued under and in pursuance of this ordinance, and shall be signed by the mayor and countersigned by the clerk of said village, under the corporate seal of said village.

"Sec. 3. That the mayor and clerk of said village are hereby authorized and directed as soon as practicable, to prepare and execute said bonds and the proceeds thereof, when they shall have been disposed of according to law, shall be used and applied under the direction of the council for the sole purpose of paying off and extending the time of payment of said maturing and matured indebtedness of said village.

"Sec. 4. This ordinance shall take effect in ten days after its publication according to law. Done at the council chambers this 15th day of February, A. D. 1892. Passed February 15th, 1892. C. B. Newton, Mayor.

"Frank Arighi, Clerk."

This ordinance was duly published in a weekly newspaper on the 20th day of February, 1892.

The defendant, the village of Kent, alleged by way of defense: "That on or about the 1st day of March, 1892, one C. B. Newton, who was then mayor of said village of Kent, and Frank Arighi, who was then the clerk of said village of Kent, pretended to execute on behalf of said village of Kent what purported to be eighty bonds for the sum of $1,000 each, together with interest coupons attached thereto, which bonds and interest coupons were, respectively, for the sums mentioned in the petition, and purported to mature, respectively, the amounts and at the times stated in the petition.

But it says that the said C. B. Newton, as such mayor, and said Frank Arighi, as such clerk, had no power or authority at the time to execute or issue such or any bonds, or coupons, or any of them on behalf of this defendant. And it says that said pretended bonds and coupons were not issued for the purpose of procuring necessary means to refund and extend the time of payment of certain then outstanding general fund bonds theretofore legally issued by said village, which, from its limit of taxation, the said village was unable to pay at maturity; and it says that there was at the time no outstanding general fund bonds or any other bonds of said village outstanding or maturing, and that the said village was not indebted at the time in any sum whatever upon any of its bonds theretofore issued, nor were any such bonds of the defendant in any sum whatever then outstanding, nor had the defendant at said time or theretofore issued any of its bonds; and it says that any issue of bonds by the defendant at said time would be to that extent an increase of the indebtedness in that amount of the defendant. It says that the said pretended bonds did not, upon their face, express the purpose for which they were purported to be issued, nor any purpose for which they purported to be issued; and, admitting that the defendant is a municipal corporation, and a village of the first class, as averred in the petition, it denies every averment and fact stated in the petition not herein specifically admitted; and it asks to be hence dismissed, and to recover its costs."

These averments of the answer were denied by the plaintiff below in his reply, and upon the issue so made the case came on for trial. It was agreed between counsel for the parties that the form of the bond as set up in the petition and the form of the coupon, and the execution of the bonds and coupons in that form, might be treated as having been proved or admitted. Further evidence was introduced, tending to show that subsequently to the execution of the bonds and their coupons they were purchased by the Rutland Savings Bank, a banking institution doing business at

Rutland, in the state of Vermont, from Spitzer & Co., who were dealers in municipal securities, at Boston, in the state of Massachusetts; that the bank at the time of such purchase paid their full nominal value, with a small premium. The coupons were paid for a time, but default was made on those maturing after March 1, 1896. It was also proven that the coupons in suit were transferred by the bank to Dana at a time prior to the commencement of the suit; that they were delivered to him; and that the transaction was, in form, at least, a purchase, Dana having given his check for the price thereof; but it further appeared that this check had never been collected. It was further shown by testimony of the officials of the bank that this transfer was made for the purpose of enabling Dana to bring suit for the recovery of the amount due upon the coupons, and for the reason that the bank might be discredited by the bringing of suits on investments made by it. In endeavoring to establish its defense, the defendant called as a witness Frank Arighi, and put questions to him adapted to that purpose. Objection being made upon the ground that the defendant was precluded from proving the facts set up in its answer as against the plaintiff, who was a *bona fide* holder of the bonds, counsel thereupon offered to show that the village of Kent had engaged in the unlawful enterprise of aiding by its bonds a glass factory located there, and had passed an ordinance to that end; that those bonds had not in fact been issued; that, instead thereof, the ordinance of February 15, 1892, was passed, and these refunding bonds were issued, and that this fraudulent and unlawful scheme was adopted for the purpose of bringing the transaction within the authorized power to issue refunding bonds. Counsel for defendant stated that they should offer no further evidence upon the subject of the *bona fides* of the savings bank; and from the colloquy which ensued between the court and counsel it appears that the questions at issue were reduced to these two: First, whether it was competent for the defendant to prove that there was no valid debt or obligation of the

village to be refunded when the refunding ordinance was passed and the bonds in question issued; and, second, whether the plaintiff, Dana, had such title to the coupons in suit as entitled him to recover. The court, being of opinion that the defendant's position in respect to both of these questions was untenable, sustained the objections to the proof offered. To this ruling the defendant's counsel took an exception. No further evidence being tendered, the court directed a verdict for the plaintiff, to which also an exception was duly taken. The verdict and judgment having passed for the plaintiff, the defendant brought this writ of error.

*E. J. Blandin*, for plaintiff in error.

*John H. Doyle*, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

The questions which were argued, and with which we have to deal in this case, are:

1. Whether it is competent for a municipal corporation, having the power to issue bonds for the refunding of its indebtedness, and having exercised that power by passing an ordinance directed to that purpose, and issued in due form its negotiable bonds, reciting that they are issued in conformity with the statute, and that all the requirements of the law have been duly complied with, and that all the conditions precedent exist, to deny its obligation as against a *bona fide* holder thereof for value, who has taken them before maturity. We think this question must be answered in the negative. To say nothing of the great number of decisions upon cases similar to this in their essential characteristics, which it would be a waste of time to go over, we shall refer only to the case of Evansville *v.* Dennett, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760, and the cases of City of Cadillac

Municipal Bonds—Ultra Vires—Bona Fide Holders—Recitals—Estoppel.

*v.* Woonsocket Inst. for Savings, 16 U. S. App. 545, 7 C. C. A. 574, 58 Fed. 935, and Risley *v.* Village of Howell, 22 U. S. App. 635, 12 C. C. A. 218, 64 Fed. 453, decided by this court. It must be admitted that the scheme of issuing the bonds of the village for the purpose of promoting a glass factory was unlawful, and the device of exercising an unquestioned power of the council of the village to give its obligations the appearance of validity was in point of law a great abuse of authority. But it is evident enough that the electors of the village, as well as the members of the council, were involved in the conspiracy to gain an unlawful end, by professing an honest and lawful purpose, and using the means permitted for such purpose. It would be an utter perversion of justice if, by such an exploit, the result finally worked out should be that the public, who have confided in the good faith and the integrity of the representations of those who sent the bonds into the market, should be made to pay the intended *bonus* to the glass factory, while the promoters of the scheme reap the benefits which were expected to result therefrom. In the case of the City of Cadillac, above cited, a like abuse of authority occurred. Bonds had been issued in aid of a railroad. Under the law of Michigan that was not authorized. But there was a statute which authorized the refunding of municipal obligations, and resort was had to the help of that statute to give a lawful appearance to the bonds, and thereby induce people to buy them. The bonds professed to be refunding bonds, and contained recitals covering the same essential facts as do those in the present case. The bonds were sold, and went into the hands of *bona fide* purchasers for value, who were compelled to bring suit to recover their money. The defenses were that the old bonds were void, and constituted no foundation for the exercise of the power to refund; and it was further contended that the new bonds were void, because they did not comply with a statute which required that they should show to what class of indebtedness they belonged, and from what fund payable. But this court held that the city was estopped, by the representations

on the face of the bonds, from disputing, as against a *bona fide* holder, the fact that the new bonds were issued to take up old bonds falling due; and it was there said:

"Power was conferred by the act upon the common council to issue new bonds to take up old bonds falling due. The question whether there were any such bonds is referred to the council. The old bonds, on the facts found by the circuit court, were, at the least, colorable obligations. The council determined to issue new bonds, and take them up It seems to us that upon these circumstances it did not devolve upon the purchaser of the new bond to look into the validity of the refunded old bonds."

Then, as to the objection that the bonds did not show the class of indebtedness to which they belonged and the fund from which they were payable, it was held that the fact that the bonds stated upon their face that they were "refunding bonds," and that they were issued "for the purpose of extending the time of payment of bonds formerly issued by said city," showed a sufficient compliance with the statutory requirement in that regard, and that, where the bonds were issued to refund former obligations, it was not necessary to state the class of the old obligations, refunding bonds being a class of themselves; and, further, that the bonds showed with sufficient certainty the fund from which they were payable.

2. The Ohio statute (Rev. St. § 2703) requires that "all bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued, and under what ordinance." Among other "purposes" for which bonds were authorized by that chapter is that specified by section 2701, where they are authorized to be issued "for the purpose of extending the term of the payment of any indebtedness incurred which," etc. Other sections of the chapter provide for the issuing of original bonds for various purposes. The facts in respect to the statutory provisions of Ohio bearing upon this question are substantially the same as those found in the Cadillac

Same—Sufficiency of Recitals.

Case to exist in Michigan. Our attention has been called to a decision of one of the circuit courts in Ohio (an intermediate appellate court of that state) in the case of Keehn *v.* City of Wooster, 13 Ohio Cir. Ct. R. 270, in which it was held that the requirement of section 2703 that such bonds should show upon their face the purpose for which they are issued is not met by the recital that they were issued for the purpose of refunding a legal and subsisting indebtedness of the municipality. The case of City of Cadillac *v.* Woonsocket Inst. for Savings is referred to and distinguished upon the differing language of the statutes of Michigan and Ohio; that of the former requiring that the bonds shall show the class of indebtedness to which they belong, while that of the latter requires that the bonds should show the purpose for which they are issued. But, with great respect, we think this difference is not material to the question under discussion, which is whether it is necessary, in issuing refunding bonds, to go beyond the immediate purpose, and recite the character of the original indebtedness for which the refunded bonds were issued. However, this case was decided several years after these bonds were issued, and we could not regard it as obligatory, even if it had been rendered by the highest court of the state, although we might regret the necessity for differing from it. The decision is not in harmony with the principles affirmed in the Cadillac Case, and we are compelled to disregard it.

In Risley *v.* Village of Howell, *supra*, it appeared that the legislature of the state had passed a special act authorizing the common council of the village to borrow money, and issue its bonds therefor, to be expended for local public improvements, provided a vote of the electors should be in favor of it. Such a vote was taken, and thereupon the common council passed an ordinance declaring that a certain railroad which was to run through the village was a public improvement, and providing that the proceeds of the bonds which had been voted should be applied to aid the railroad. The declaration of this ordinance that the railroad was a public

improvement was in the teeth of the express holding of the supreme court of the state that railroads were not such improvements as could be promoted by taxation of municipalities in Michigan. But the bonds were issued bearing upon their face recitals that they were improvement bonds, and that they were issued under the authority of the act relating to public improvements, and under the ordinance of the village of Howell; and thereafter came into the hands of a *bona fide* purchase. The village, upon being sued, resisted upon the grounds that the bonds were issued for an illegal purpose; that the issuance of the bonds was not authorized, and was a wanton abuse of the power by the officials of the village; and that all persons were charged with notice of these facts by the ordinance recited in the bonds. This court had no doubt, and has none here, of the illegality of the purpose of the proceedings of the common council of the village in issuing the bonds thus covertly for a forbidden object; but as the bonds professed, and on their face appeared, to be issued in promoting an object authorized by the statute, we held that the fraud was that of the agents of the village, and that the consequences of it could not be visited upon innocent parties. We further held that the reference to the ordinance was not sufficient to put the purchaser upon inquiry in view of the fact that the recital was that the bonds were issued under the authority of the statute, and, as an ordinance providing for the issue was in the common course of the execution of the statutory authority, the purchaser had the right to suppose that it was in conformity with the statute, and was not thereby put upon inquiry as to the lawfulness of the purpose for which the bonds were issued. And these views were confirmed by the supreme court of the United States in Evansville *v.* Dennett, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760, decided not long after, in a case involving very similar facts. Section 2703 of the Ohio statutes, above referred to, contains a requirement, not contained in the Michigan statutes, that "all bonds issued under the authority of this chapter shall express * * * under

what ordinance they were issued." This requirement is also fully met by the recital in the bonds that they were issued under the authority of "an ordinance duly passed by the village council February 15, A. D. 1892." The recitals in the bonds from which the coupons in the bonds here sued upon were taken contained very full and ample recitals of the existence of all the facts which were required for their lawful issue, and seem to show that those making them were at pains to assure the public of their genuineness and validity, and to invite the purchasers' confidence.

3. Upon the question of the right of the plaintiff to bring the action we think there is no difficulty. Doubtless it was competent for the defendant to show that the savings bank had the beneficial interest in the subject of the suit in order to let in any defense which it might have as against the bank; but it had no further interest in the matter. Assuming that the savings bank delivered these coupons to Dana for the purpose of enabling him to bring suit upon them, that he gave his check therefor, and that it was understood between them that he should turn over the proceeds of the collection to the bank, and take up his check,—which is a construction of the evidence as favorable to the defendant as it would bear,—still this would suffice to enable him to bring the suit in his own name. His right to recover would be no larger than that of the bank. In that respect he would stand precisely in its position, and, if the bank was a *bona fide* holder, he would recover in that character. The title to negotiable paper payable to the bearer passes by delivery, unless the attendant circumstances show that such was not the intention. But here the bank transferred these coupons for the purpose of enabling him to bring suit. It is implied in that that such title should pass as would enable him to sue, for without it the object of the transfer could not be accomplished. Possession of such paper where it is payable to bearer, or where it is payable by indorsement to the holder, coupled with an authority to bring suit upon it, is sufficient for that

Same—Action on Coupons—Parties.

purpose. In Law *v.* Parnell, 7 C. B. (N. S.) 282, the action was brought in the name of an agent as custodian of paper held for another, but indorsed in blank, the agent being authorized by his principal to bring suit upon it. It was held that he had sufficient title to maintain the suit, EARLE, C. J., saying:

"The bill being indorsed in blank, the bank had the right to hand it over to a third person to sue upon it, without indorsing it; and therefore the plaintiff, if he was the lawful holder of the bill, and had authority from the bank to do so, had a perfect right to sue upon it."

This case was directly approved in O'Brien *v.* Smith, 1 Black, 99, 17 L. Ed. 64, where the suit was brought by the cashier of a bank upon a note belonging to it, but of which he had control for its use. In affirming a recovery against the objection that the plaintiff could not recover in his own name, CHIEF JUSTICE TANEY, speaking for the court, said:

"The authorities referred to by the counsel for the defendant in error are conclusive, and it cannot be necessary to discuss these questions, which we consider as too well settled to be now open to serious controversy."

The case of Boyd *v.* Corbitt, 37 Mich. 52, is precisely in point. There Boyd, who was a collecting agent for one Martin, received from him a note indorsed in blank, and brought suit thereon in his own name; and it was held that he had sufficient title on which to maintain the suit.

Where, as in Ohio, the Code of Procedure requires that the suit shall be brought by the real party in interest, it is nevertheless held that, when the plaintiff is the lawful holder of the note, it is no defense to the maker to show that the transfer under which the plaintiff holds it is without consideration, or subject to equities between him and his assignor, or colorably, and merely for the purpose of collection, and that it is sufficient if he have the legal title, either by written transfer or delivery, whatever may be the equities of his relation with his assignor. White *v.* Stanley, 29 Ohio St. 423; Eaton *v.* Alger, 47 N. Y. 345; Hays *v.* Hathorn, 74 N. Y. 486; Cottle *v.* Cole, 20 Iowa 481.

Note

Reference is also made by counsel for defendant to the fact that a statute of Ohio provides that ordinances shall not go into effect until 10 days after publication thereof is had, and that the ordinance of March 15, 1892, was not published until the 20th of that month, whereas the bonds are dated March 1st, and it is therefore claimed that the ordinance was not operative when the bonds were issued. To this there are several answers. In the first place, there is no evidence when the bonds were negotiated by the village. Secondly. February of that year having 29 days, by excluding the first and including the last days it became operative on the 1st day of March. But, lastly, it is recited in the bond that "all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed in regular and due form as required by law." If, as contended, the passage and publication of the ordinance was a condition precedent to the issuing of the bonds, this recital represented that these things had been done. As to the matters expressly required by the statute to be shown upon the face of the bonds, as we have already stated, they are sufficiently disclosed.

Same—Same—Recitals—Estoppel.

We think there is no errors hown in the record, and the judgment of the circuit court is accordingly affirmed.

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NOTE.

**Estoppel of Municipality to Deny Validity of Bonds Valid on Their Face.**—See Town of Klamrath Falls *v.* Sachs (Ore.), 2 Mun. Corp. Cas. 208, and *note*, p. 228; Pickens Tp. *v.* Post (C. C. A.), 99 Fed. Rep. 659; Miller *v.* Perris Irr. Dist. (C. C.), 99 Fed. Rep. 143; Board of Com'rs *v.* Sutliff (C. C. A.), 97 Fed. Rep. 270; Geer *v.* Board of Com'rs (C. C. A.), 97 Fed. Rep. 435; Wesson *v.* Town of Mt. Vernon (C. C. A.), 98 Fed. Rep. 804; Rondot *v.* Rogers Tp. (C. C. A.), 99 Fed. Rep. 202; Grattan Tp. *v.* Chilton (C. C. A.), 97 Fed. Rep. 145; Lyon County *v.* Keene Five-Cent Sav. Bank (C. C. A.), 100 Fed. Rep. 337; Brattleboro Sav. Bank *v.* Board of Trustees (C. C.), 98 Fed. Rep. 524. *Compare* Nat. L. Ins. Co. *v.* Mead (S. Dak.), 82 N. W. Rep. 78; Noel Young B. & S. Co. *v.* Mitchell County, 21 Tex. Civ. App. 638.

## D'AMICO

*v.*

## CITY OF BOSTON.

*Supreme Judicial Court of Massachusetts, Oct. 18, 1900.*

**Discontinued Highway on Lands Taken by City for Water Basin—Defects Contract to Furnish Temporary Way—Liability of City.***—The defendant city, by taking by right of eminent domain the land within the limits of a highway for a water basin, became the owner of the land in fee. Under its contract with the town in which such land was situated, defendant was bound to provide for the public "a safe and convenient way of travel," either over or around the old highway, which was discontinued while a new highway was being constructed. It did not construct a temporary way around the discontinued highway, but left the latter open, with nothing to indicate that it was not to be used. *Held*, that defendant owed a person using the discontinued highway the duty of not exposing him to a dangerous condition thereof which reasonable care on its part could have prevented.

**Same—Same—Same—Same—Evidence.**—In an action for personal injuries caused by the defective condition of the discontinued highway, while it was so left open, such contract was admissible in evidence, for the purpose of showing that the way was left open for the use of the public.

**Same—Same—Same—Same.**—In such an action, the fact that the new way, though not completed, was used by the public at the time of and before the accident, was immaterial; as defendant's obligation to provide a temporary road was not ended "until the completion of the substitute therefor."

**Same—Same—Same—Same.**—As the defendant city made the contract to do the work of constructing such temporary way and new highway as part of the work of constructing a new water basin for its water supply, which was conducted by it as a commercial undertaking, it was liable for personal injuries caused by its failure to construct a safe temporary way to the same extent as an individual making such a contract would have been liable.

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*See Peake *v.* City of Superior (Wis.), 4 Mun. Corp. Cas. 127, and *foot-note*.

D'Amico *v.* City of Boston

EXCEPTIONS by plaintiff from Middlesex county superior court. *Exceptions sustained.*

*J. J. Shaughnessy*, for plaintiff.

*Samuel M. Child*, for defendant.

LORING, J. We are of opinion that the ruling directing a verdict for the defendant was wrong. The city of Boston had taken, by right of eminent domain, a large tract of land in Southboro for the purpose of constructing on it a water basin in connection with its water supply. A portion of the highways which had been laid out through this tract of land before it was taken by the city was discontinued, and, among others, the way on which the plaintiff was driving when the accident occurred causing the injuries complained of in this action. The city had made a contract with the town of Southboro to do the work made necessary by the discontinuance of these ways, by the relocation of other ways in this tract, and by changing the grade of still other ways in it. The ways discontinued were marked blue on a plan referred to in this contract, those relocated were marked red, and those the grade of which was changed were marked yellow. In this contract was the following covenant of the city of Boston: "Said city * * * shall secure to all persons desiring to use any of said parts shown in red, yellow, or blue a safe and convenient way of travel over or around each part from the time said city shall construct or commence work on the same until the completion of the substitute therefor in the manner aforesaid, and shall at all times during the progress of its work secure safe and convenient ways of travel between Southboro and the neighboring towns, and between the different parts of said town." This contract was ratified and confirmed by St. 1894, c. 108. The plaintiff, with three others, was driving from Fayville to Marlboro on one of the ways which had been discontinued. It is stated in the bill of exceptions that this way, though discontinued, "had been continually in

Case Stated.

use by the public." "There was no other road open for travel between Fayville and Marlboro at the time." "The road remained open the same as it was when the land was taken by the defendant, and no notices were posted, or anything done to indicate that the road was not to be used." "The road to be substituted for this road under the said contract with the town of Southboro was being constructed, but not completed, at the time of the accident. The defendant was engaged at this time in the construction of the new roads called for in the contract between the city of Boston and the town of Southboro. There was evidence that the discontinued way over which the plaintiff was traveling was in a defective condition, and, if the defendant owed the plaintiff any duty in keeping it in a safe condition for travel, that it was negligent in allowing it to be in the condition in which it was at the time of the accident.

We are of opinion that the defendant had invited the plaintiff to use the way in question, and therefore owed him the duty of not exposing him to a dangerous condition, which reasonable care on its part would have prevented. Holmes *v.* Drew, 151 Mass. 578, 25 N. E. 22. In Moffatt *v.* Kenny, 174 Mass. 311, 54 N. E. 850, it was held that if the owner of land lays out a road or way on his own land connecting two public highways, and constructs it in all respects like a public way, he has not thereby represented that the way is a public way, nor has he thereby invited the public to use it, if in fact the way was intended for the convenience and use of the abutters on the road or way in question. In that case, notices had been posted stating that the way was not a public way. In Stevens *v.* Nichols, 155 Mass. 472, 29 N. E. 1150, 15 L. R. A. 459, it had been previously held, under the facts appearing in that case, that the failure to post a notice that the way was not a public way did not change the result. On the other hand, it was held in Holmes *v.* Drew, 151 Mass. 578, 25 N. E. 22, that an owner who constructs a sidewalk uniform in appear-

Discontinued Highway on Lands Taken by City for Water Basin—Defects—Contract to Furnish Temporary Way—Liability of City.

ance, in part on his own land and in part within the limits of a public way, impliedly invites the public to use the whole walk as part of or as a public way. In the case at bar the defendant must be taken to have left the way open, intending that it should be used by the public as a way, and not for the use of abutters.

The defendant, by taking for a water basin the land within the limits of the old highway, which was at the same time discontinued, became the owner of the land in fee. Under its contract with the town of Southboro, the defendant was bound to provide for the public "a safe and convenient way of travel," either over or around the discontinued way, while the new way was in process of construction. It did not construct a temporary way around the discontinued way, and therefore, in leaving the old way open for travel, the defendant must be taken to have elected to leave "a safe and convenient way of travel" over the discontinued way in place of around it. While it is true that the plaintiff cannot sue on the contract under which the way was left open, since he was not a party to it, the contract is important, as showing that the way was left open for the use of the public. If it was left open for the use of the public, there is an invitation to the public to use it, and the case falls within Holms *v.* Drew, 151 Mass. 578, 25 N. E. 22.

Same—Same—Same—Same—Evidence.

It is stated in the bill of exceptions that "on behalf of the defendant there was evidence that there was another road open for travel between Fayville and Marlboro, but that it was not then made; it was being constructed, but not completed,—it being one of the new highways to be built by the city of Boston under its agreement with the town of Southboro." All that this can fairly be taken to mean is that the new way, though not completed, was in fact used by the public. But the defendant's obligation to provide a temporary road was not ended "until the completion of the substitute therefor." This evidence did not show that that time had arrived.

Same—Same—Same—Same.

As the city made the contract to do the work of constructing these roads as part of the work of constructing a new water basin for its water supply, which is conducted by it as a commercial undertaking, it is liable to the same extent to which an individual would have been liable in making such a contract, and the plaintiff was not bound to give the notice required by Pub. St. c. 52, § 19. Exceptions sustained.

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## McHUGH

*v.*

## CITY OF BOSTON.

(*Supreme Judicial Court of Massachusetts, May 19, 1899.*)

**Ownership of Municipal Highways—Statute.**—A claim for work done in the construction of a highway duly laid out in a city is not within Mass. St. 1892, c. 270, providing that a person to whom a debt is due for labor performed in constructing any public work owned by a city or town under a contract with any person other than such city or town, shall have a right of action against the city or town to recover such debt with costs; as a municipality does not become the owner of either the fee or the easement in any highway laid out within its limits.

APPEAL by plaintiff from Suffolk county superior court. *Affirmed.*

*Chas. R. Darling* and *J. F. O'Connell*, for appellant.

*Samuel L. Child*, for appellee.

HAMMOND, J. The plaintiff was hired by a person having a contract with the defendant for the construction of Lonsdale street, a public highway duly laid out in the defendant city, and, not having been paid for his work, brings this action, relying upon St. 1892, c. 270. He seasonably filed the required certificate, and the main question is whether a claim for work done in the construction of a highway is within

the first section of the statute. The section provides that "a person to whom a debt is due for labor performed in constructing any building, sewer, drain, water works, or other public works owned by a city or town under a contract with any person other than such city or town * * * shall have a right of action against such city or town to recover such debt with costs." The plaintiff contends that a highway or street is included in the phrase "other public works," and that it may be said to be "owned" by the city or town.

The first idea which occurs to one in considering this contention is that, if the legislature meant to include public ways, it is strange they did not expressly say so. In a general sense it may be said that there is no more prominent item in the public charges than that concerning the construction and repair of public ways, and no town is free from the burden. It seems highly improbable that a statute which was intended to apply to such a prominent and universal object of expense as the public ways should fail distinctly to name them, especially when it names sewers and drains, which are by no means so general, and are comparatively unimportant. Again, in no proper sense can the public ways be said to be owned by the town. The town house, engine house, sewers, drains, and waterworks may be, and generally are, the private property of the town. They are constructed for the use of the inhabitants, and the ownership is in the town, in its corporate capacity. But there is no such ownership in the highways. The town does not become by virtue of the laying out the owner either of the fee or the easement.

In Inhabitants of Andover *v.* Sutton, 12 Metc. (Mass.) 182, which was an action upon the case to recover expenses paid by the plaintiffs in repairing a highway which had been rendered defective by the flow of water caused by the dam of the defendants, who were mill owners, one of the questions was whether the town was the owner of the way; and, in discussing that matter, HUBBARD, J., uses the following language: "In the case at the bar, the plaintiffs are not the owners of the land over which the road in question passes,

nor are they as a corporation the owners of an easement. It is a public highway, in which every citizen has an easement, and no one to the exclusion of another. The town in the distribution of the public burdens is bound to maintain that portion of the highway which is within its territorial limits, but in its corporate capacity it neither owns the soil nor the easement. It has no private rights which are protected by the statute [giving remedy to landowners], or are within its purview or intent." The action, however, was maintained because the town had sustained a damage in being compelled to repair the defect caused in the road by the act of the defendants in raising their dam and overflowing the road. To the extent of its liability to repair, the town may, in a sense, be said to be interested in the road, and, in the case of a bridge, that interest might be an insurable interest. And in many cases the town may for its own protection in this respect bring suits to prevent an injury to the way. But its right thus to interfere for the protection of the way rests upon its obligation to keep the same in repair, and in no sense upon any claim of ownership. Inhabitants of Springfield *v.* Connecticut R. R. Co., 4 Cush. 63, 67. In a certain sense, also, a town may be said to have an actual or constructive possession of a bridge or way, or a qualified interest therein, sufficient for the purposes of Pub. St. c. 214, § 14; Com. *v.* Fitzgerald, 164 Mass. 587, 42 N. E. 119. But, whatever may be the decisions in other states, it is plain that in this states the phrase "owned by the town," in its ordinary acceptation, in no proper sense describes the relation which the town bears to its public ways. Cheshire *v.* Reservoir Co., 119 Mass. 356, and cases cited. Judgment affirmed.

## CITY OF DURANGO

*v.*

## CHAPMAN.

(*Supreme Court of Colorado, Feb. 5, 1900.*)

**Water Supply—Validity of Ordinance to Prevent Pollution.**—The contention that the ordinance in question, the object of which was to protect the city's source of water supply from pollution, undertook to declare a pigsty or slaughter house a nuisance *per se*, was without foundation.

**Case at Bar.**—It was error to find defendant not guilty of a violation of such ordinance.

**Same—Pollution of Common Source of Several Municipalities—Penalties—Jurisdiction.**—The fact that one municipal corporation takes its supply of water from a stream at a point which would give it jurisdiction to also punish defendant for the same offense of polluting the stream for which he is being prosecuted by another municipal corporation cannot prevent the latter from exercising jurisdiction for such purpose, as the doctrine that there cannot be, at the same time, within the same territory, two distinct municipal corporations, exercising the same powers, jurisdictions, and privileges, is not applicable; especially where it does not appear that the other municipality has passed an ordinance to punish such an offense.

On Rehearing.

**Petition for Rehearing.**—The party asking for a rehearing will not be permitted to set up new and different grounds in support of his petition from those urged by him in the original hearing; and it is not sufficient that a point was merely suggested in an oral argument.

ERROR by city to La Plata county court. *Reversed.*

Case Stated.

Defendant in error was proceeded against before the police magistrate of the city of Durango for the violation of section 3 of Ordinance No. 42 of the city. From a judgment of conviction he appealed to the county court. The ordinance in question is entitled "An ordinance

for the protection of streams above the city's source of water supply and of the city's reservoir from nuisance." Section 3 provides that "the construction or keeping of any * * * pigsty * * * or any place or premises of whatever kind, the drainage from which is capable of contaminating or rendering water impure or unwholesome, is hereby prohibited upon the Animas river, or upon the banks thereof, from the dam at the head of Boulevard street of said city * * * to the distance of five miles northerly upon said river from said dam. * * *" It also provides that the keeping or establishment of any places by its terms prohibited is a nuisance, and any person violating the section shall, on conviction, be fined. By the general laws of the state, municipal authorities are empowered to protect the water of the stream from which their water supply is derived from pollution, and for that purpose jurisdiction is conferred for the distance of five miles above the point from which such supply is taken, and authority conferred to enact all ordinances and regulations necessary to carry that power into effect. Subdivision 68, § 1403, 2 Mills' Ann. St. The evidence establishes that the city takes its water supply from the Animas river; that defendant in error maintained a slaughter house and pigsty upon its banks within five miles above the point where such supply is diverted; that the slaughter house is located from 75 to 150 yards from the margin of the stream, varying somewhat according to the stage of water; that drainage from such place would flow into a slough which, in low water, appears to be separated from the main river by a bar, through which the water would find its way into the stream; that the pigsty extends down to the margin of the river; that defendant in error kept swine there which had access to the waters of the stream, and that drainage from this sty would pass directly into the river. It appears that the slaughter house was cleanly, for a place of that character. Other sections of this ordinance provide that any person, within the distance of five miles above the point where the water supply of the city is diverted, who shall allow any

offensive or unwholesome substance to remain upon his premises in such position that such substance, or the drainage therefrom, might be carried by natural causes into the river, or who shall permit to flow from any establishment any foul or contaminating fluid into such stream, shall be deemed guilty of a nuisance, and on conviction be fined. It also appears that Animas City is located between the city of Durango and the point where defendant in error maintained his slaughter house and pigsty, and obtains part of its water supply from the Animas river. There is no evidence that the latter town has enacted any ordinances to protect its water supply from pollution. From a judgment discharging the defendant, the city brings the case here for review, on error.

*T. J. Jackson*, for plaintiff in error.

*O. S. Galbreath*, for defendant in error.

GABBERT, J. (after stating the facts). On behalf of the defendant in error, his counsel urges that the section of the ordinance under consideration is illegal, for the reason that the municipal authorities had no power to declare a pigsty or slaughter house a nuisance *per se*, except they be maintained within the limits of the city or within one mile beyond. In support of this proposition, we are referred to subdivisions 51, 53, § 4403, 2 Mills' Ann. St., which in terms provide that the city council has authority to direct the location and regulate the management of slaughter houses and other designated places, and also to prohibit any offensive or unwholesome business within the limits of the municipality or within one mile of its boundaries. This is not the material or decisive question, under the undisputed facts, and it is unnecessary to determine it in this case. The legislature has clothed the municipal authorities with power to protect the stream from which the inhabitants of the city derive their supply of water from pollution, within prescribed limits. In pursuance of this power, an ordinance has been passed for that pur-

Water Supply—Validity of Ordinance to Prevent Pollution.

pose. It must be reasonably construed, and given that interpretation, if possible, which will effect the object of its passage (1 Dill. Mun. Corp [4th Ed.] 420), and in construing it we must consider its provisions as a whole. The manifest purpose of the ordinance, as indicated by its title, is to protect the stream from pollution from which the water supplied to the city for the use of the inhabitants is drawn. In sections other than the one under which defendant in error was prosecuted, it provides for the punishment of persons who shall permit any fluid which would render the waters of the stream impure to flow into it from premises occupied by them, or who shall permit any substance to remain upon their premises within such distance of the stream that such substance, or the drainage therefrom, might fall into or be carried into the river. The section in question inhibits the construction or keeping of any pigsty or any place upon the bank of the river the drainage from which is capable of rendering the water of the stream impure or unwholesome. It was not the mere keeping of these places within prescribed limits which was the particular thing prohibited, but the drainage therefrom which flowed or might flow into the river was the danger which the ordinance sought to obviate. The evidence established that the pigsty and slaughter house maintained by defendant in error are within five miles above the point where the water supply of the city is diverted, and are so situated with respect to the stream from which this supply is drawn that the drainage therefrom not only might, but actually did, flow into the stream. This, at least, is true with respect to the pigsty; and so with the drainage from the slaughter house or the surrounding premises, although it might first filter through the sands of the bar at the mouth of the slough. It also appears that the hogs confined in the yard had access to the waters of the river. The fact that these places may have been well kept is no defense, for it needs no evidence to demonstrate that if water flowing over the surface of an inclosure in which swine are kept, or from a slaughter house

or over the ground in its near vicinity, whether from natural causes or otherwise, reaches the stream from which the city draws its water supply, it will be rendered impure and unwholesome. Common knowledge teaches this would be the result, without proof. North Chicago City Ry. Co. *v.* Town of Lake View, 105 Ill. 207. These were the material facts, regarding which there is no conflict in the evidence, and it was error for the trial court to find the defendant not guilty. In disposing of this case upon the ground we do, we do not wish to be understood as deciding that the slaughter house and pigsty of defendant in error, by reason of their close proximity to the river, might not be declared nuisances *per se*, without extrinsic proof that they actually polluted the waters of the stream. North Chicago City Ry. Co. *v.* Town of Lake View, *supra*.

Case at Bar.

It is also claimed by defendant in error that, because the town of Animas City takes its supply of water from the Animas river at a point which would give the latter jurisdiction to also punish defendant for the same offense for which he is being proceeded against in this case, the city of Durango cannot exercise jurisdiction for this purpose. In support of this claim, the doctrine is invoked that there cannot be, at the same time, within the same territory, two distinct municipal corporations, exercising the same powers, jurisdictions, and privileges. This proposition has no application to the case at bar. There is no evidence that Animas City has passed an ordinance which would render defendant in error liable for the pollution of the stream by drainage from his slaughter house and pigsty, and, even if it had, that would be no defense to this action; for in such case his act in polluting the waters of the river would constitute two different offenses against two distinct sovereignties. McInerney *v.* City of Denver, 17 Colo. 302, 29 Pac. 516; Hughes *v.* People, 8 Colo. 536, 9 Pac. 50; People *v.* Raims, 20 Colo. 489, 39 Pac. 341. Any other conclusion would result in the anomaly that if two municipalities were so situated with

Same—Pollution of Common Source of Several Municipalities—Penalties—Jurisdiction.

respect to each other, secured their water supply from the same source, and at such relative points that the jurisdiction of each for the purpose of preventing pollutions was co-extensive, the common supply could be polluted with impunity within such territory. The judgment of the county court is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. Reversed and remanded.

On Rehearing.

PER CURIAM. In petition for rehearing filed by defendant in error, our attention is called to the fact that no exception was properly taken or preserved to the judgment in this case, and for that reason we are precluded, under repeated decisions, from reviewing the evidence for the purpose of determining its sufficiency to support the judgment of the trial court, and, as the judgment below was reversed for the reason that the facts established by the testimony clearly showed that it was erroneous, a rehearing should be granted. Counsel concede that in their brief our attention was not called to the point now insisted upon, but state that it was suggested in the oral argument. The party asking for a rehearing will not be permitted to set up new and different grounds in support of his petition from those urged by him in the original hearing. Orman *v.* Ryan, 25 Colo. 383, 55 Pac. 168. We are not prepared to say that counsel for defendant in error in his oral argument did not refer to the absence of an exception to the judgment of the trial court, although we do not recall it; but, where entirely new questions are raised on such argument from those contained in the printed briefs filed, counsel urging them, if they do not wish to take the chances that they be overlooked by the court, must supplement such argument by either printed or typewritten brief, calling our attention to such points as they desire to have considered not contained in their original briefs; for it is manifestly impossible for us to remember points made in a case which are not thus presented. No such briefs were filed in this

Petition for Rehearing.

case by either counsel. For these reasons it is too late now to urge that no exception was taken to the judgment of the lower court. We think that the other questions raised by the petition for rehearing have been disposed of correctly in the main opinion in the case. Petition for rehearing denied.

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MARCOTTE

*v.*

CITY OF LEWISTON.

(*Supreme Judicial Court of Maine, May 29, 1900.*)

**Streets and Highways—Injuries from Defects—Notice to City.*** In an action brought to recover damages for an injury to plaintiff's horse, caused by an alleged defect in a highway in defendant city, within 14 days after the accident, the plaintiff gave written statute notice of it to the municipal officers of the city in which it was stated to have occurred on February 12, 1898, and the declaration alleged the same date. At the trial the plaintiff offered evidence tending to show that the accident occurred on the 13th instead of the 12th. This evidence was excluded, and the plaintiff excepted.

*Held*, that the evidence should have been admitted.

Same—Same—Same.—The notice having been given within 14 days after the injury, as required by statute, the mistake in the date of the accident did not vitiate the notice and render it inoperative.

(Official.)

EXCEPTIONS by plaintiff from Androscoggin county supreme court. *Exceptions sustained.*

Argued before PETERS, C. J., and EMERY, WHITEHOUSE, WISWELL, and STROUT, JJ.

*M. L. Lezotte*, *H. W. Oakes*, *J. A. Pulsifer*, and *Forest E. Ludden*, for plaintiff.

*H. E. Holmes*, for defendant.

*See Gurney *v.* Rockport (Me.), 3 Mun. Corp. Cas. 216, and *footnote.*

Marcotte *v.* City of Lewiston

STROUT, J. Action to recover for injuries caused by a defective way. Within 14 days after the accident plaintiff gave written notice to the defendant, in accordance with Rev. St. c. 18, § 80. This notice was served on February 23d. In the notice the injury was stated to have occurred on February 12, 1898, and the declaration alleged the same date. At the trial plaintiff offered evidence tending to show that the accident occurred on the 13th instead of the 12th. This evidence was excluded, and a verdict ordered for defendant. Plaintiff has exception.

Case Stated.

But this error in the date of the accident defeat the action? We think not. The cause of action was complete, if this was a defective way, of which defendant had 24 hours' previous notice, and an injury was received thereby while plaintiff was in the exercise of due care, and without fault on his part. The date of the accident is in no sense an element. The statute is remedial, and to be construed and applied as such. The right to the remedy accrues when the injury is received, but to protect towns against possible fraud and stale claims, where opportunity for investigation may be lost, and discovery of evidence difficult, the statute requires the party, within 14 days after its occurrence, to give written notice to the municipal officers, "setting forth his claim for damages, and specifying the nature of his injuries, and the nature and location of the defect which caused such injury." The manifest purpose of this requirement is to afford opportunity to the town officers to examine the place, ascertain from persons having knowledge of the facts, while the recollection is fresh, all the attending circumstances, and determine as to the liability of the town, and prepare its defense, if the town officers decide to defend. Blackington *v.* Rockland, 66 Me. 332; Wadleigh *v.* Inhabitants of Mt. Vernon, 75 Me. 79; Low *v.* Windham, *Id.* 113.

Streets and Highways—Injuries from Defects—Notice to City.

For all these purposes it is immaterial on what day the accident occurred. Nothing in the statute requires state-

ment of the day. The notice must be given within 14 days. If given within that limit, it will be sufficient, if no specific day is named. The plaintiff is allowed that time to ascertain the precise location and character of the defect, and the nature and extent of his injury, and to state them on paper, and the investigation of the town officers should cover the same range. The court would not be justified in importing into the notice a requirement, not in the statute, which is not of the essence of the right, and is unimportant to the town.

Same—Same—Same.

It is quite easy, in reckoning back 14 days, to make an error of one day, and it seems a hardship to deprive a party of all remedy because of such mistake. Plaintiff could have no object intentionally to misstate, and it is inconceivable that in any investigation the town might make of the occurrence it would fail to discover the facts as they were on the 13th, even if they were inquiring of the 12th.

In indictments for crime, the offense must be alleged of a particular day, but, except when time is an element in the crime, it may be proved upon any other day within the statute limitation. The same is true in all civil pleading. Is there any reason why this notice should be held bad because of mistake of a single day, where there is no evidence nor any probability that the town was thereby misled to its injury?

The notice in this case concludes, "This notice is given before the expiration of fourteen days since the accident," which would be a compliance with the language and purpose of the statute without a specific date.

While this court has held that the notice should contain a particular description of the location and character of the defect in the way, and the nature of the injuries suffered, it has never held that it was necessary to state the day or the hour of the accident. To do so would impose upon the injured party a duty not imposed by the statute, nor within its reason and purpose, and might defeat a meritorious suit by a technicality not necessary or important to the rights of the

parties. The notice must "set forth his claim for damages," but it need not state the amount claimed. Morgan *v.* City of Lewiston, 91 Me. 571, 40 Atl. 545.

Notwithstanding the date of the 12th in the notice and in the declaration, it was competent for the plaintiff to show that the accident occurred on the 13th.

The evidence should have been admitted.

Exceptions sustained.

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CLONEY

*v.*

CITY OF KALAMAZOO.

(*Supreme Court of Michigan, Sept. 24, 1900.*)

**Injury to Pedestrian—Unguarded Excavation in Street—Contributory Negligence.***—In an action for injuries to a pedestrian caused by his stepping into an unguarded excavation made in a cross walk of a city street in tearing up the pavement of the street for the purpose of repaving, it appeared that plaintiff knew that the work was being done at or near the crossing where the accident occurred, and, having seen the work going forward, must have been aware that such excavations were being made, and, though it was at night, he could have readily seen the excavation before stepping into it, as there was an arc light hanging over the street near such point, besides other lights in the vicinity. Plaintiff testified that he was observing a team at the time, and that he was not aware that the work was being done exactly at the crossing. *Held*, that a verdict should have been directed for the defendant city.

ERROR by defendant to Kalamazoo county circuit court. *Reversed.*

*L. N. Burke* and *Dallas Boudeman*, for appellant.

*N. H. Stewart* and *E. M. Irish*, for appellee.

LONG, J. It appears that the defendant city in the summer of 1896 contracted with certain parties to pave Burdick

*See notes at end of case.

street. That street crosses Main street at right angles, and is 66 feet wide. Main street is 100 feet wide. Prior to September 1, 1896, the pavement had been completed up to the south line of Main street, leaving only the intersection of the streets to complete the pavement. Burdick street had formerly been paved with cedar blocks, and, in doing the work of repaving, the contractor took up those blocks and a few inches of dirt, and filled the space with about 6 inches of broken stone and 2 inches of sand, and upon that foundation laid the brick. Labor Day came on the first Monday of September, and, the authorities being desirous of completing the work before that time, it was arranged that the contractors should continue to work day and night to complete the balance of the paving. On September 2d the contractors began tearing up the intersection of the streets. This work continued during the day and until 10:30 o'clock that night. It is the claim of the plaintiff that about 8:30 o'clock that evening, as he was walking west on the south side of Main street, and as he started to cross Burdick street, he stepped into an excavation caused by tearing up the pavement on the street, and was severely injured thereby, and the result thereof was to produce a double inguinal hernia. This suit was brought to recover damages, and on the trial he received a verdict for $5,000. Defendant brings error.

The main contention of defendant's counsel is that the evidence shows the plaintiff was guilty of contributory negligence, and that therefore the court should have directed a verdict in favor of defendant. It appeared that plaintiff was a merchant doing business on Burdick street. The pavement had been laid past his store before the time of the accident. He saw the work going forward, knew it was being done, and must have known that, in order to do the paving, the street would have to be excavated to some depth. On the evening in question he passed down Burdick street to the corner of Main street. McDonald's drug store is situated on the corner. Plaintiff turned east on Main street a few rods to visit a place

of business, and a short time thereafter he returned westward along Main street. Arriving at the corner of Burdick and Main streets, he attempted to continue directly across Burdick street. The pavement had been torn up at that crossing, as it was a part of the street that was to be finished that night. It was dug and plowed up and excavated to some depth close to the curb, and plaintiff, at once on stepping beyond the curb, fell into the excavation. At that time two arc lights were burning. One was 56 feet north of the place of the accident, and one was hanging over the center of that part being paved. Lights were also burning in McDonald's drug store. Plaintiff testified as follows: "Q. You then came down to the corner to the east side of Burdick and Main, to McDonald's drug store? A. Yes, sir. Q. And did you notice that they were working there in the street when you got down there to the store [meaning McDonald's drug store]? A. Yes; I noticed Taft plowing out there in the center of the street. That's all the men or teams I saw there. He was plowing dirt up by the bricks on Main street, about opposite to McDonald's,—somewhere south of McDonald's, on Main street. The team, I think, was on the cross walk leading from McDonald's south towards the First National bank. The team was headed east when I saw them. Q. Did you stop and look at them awhile? A. Yes; I stopped and looked at them, and saw the team working over there. That was before I went up to the Building & Loan." Witness continued: "I might have stood there looking at them working in the street five minutes. I stood in front of McDonald's drug store, east of the corner of Main street. Q. They had taken out some dirt, had they, in the street? A. I didn't notice whether they had or not. I know they were plowing it up. I didn't notice whether they had drawn out any or not. Q. You noticed they had the whole corner ripped up there, didn't you? A. I didn't pay any attention to it. I was looking at the team. Q. You could have seen that, all right? A. Probably I could if I went and examined it. I was looking at the team. I didn't pay any

attention to anything else. Q. You could not help, when you saw the team—What were you looking at the team for? A. They were plowing. They were not drawing any dirt, I think. Q. Was there anything singular about the team, that called your attention to it? A. Yes, sir; there was. Q. What was it? A. They worked so steady over those tiles, and among that iron and track. That's what I was looking at. Q. You could see that the whole corner at the intersection was disturbed, couldn't you? A. I didn't pay any attention to it. Q. Why didn't you? A. Because I wasn't looking at it. I was looking at the team. Q. Wasn't there anything to prevent you seeing it? A. I don't know whether there was or not. Q. What was there, if anything, to prevent your seeing exactly what condition the street was in? A. I don't know as there was anything, if I had looked at it, but I didn't take any pains to look out that way. All I was looking at was the team. Q. Didn't have any difficulty in seeing the team there? A. No, sir; they were a gray team. Q. You didn't have any difficulity in seeing the man who was driving the team, did you? A. No, sir. * * * Q. When you came down the street, what did you do? A. I started to go right up to Cobb & Hunter's. Q. Did you stop at the corner there at the time? A. No, sir; I went straight on. Q. Did you look around to see what they were doing at the street then? A. I did not; no, sir. Q. You didn't pay any attention then? You just—A. [interrupting]. I went right on. Q. Where were you looking? A. Well, I was—I don't know where I was looking. I was looking ahead, I presume. I don't think it was quite as light when I came from the Building & Loan Association up to the corner. It was getting darker all the time,—some darker. I was probably down there five or ten minutes. There were people standing there on the corner when I came up from the Building & Loan Association. I didn't notice who they were. They were not standing near to this cross walk. Q. As you came along up to the corner on the east side of that street, near this cross walk, didn't you look to the south, to see

Taft's team working there? A. No, sir; I don't think I did. Q. Did you look over towards where the team was working? A. Don't think I looked that way at all. Q. What makes you think you didn't? A. Because I was going right up there. I started up there, and I went right along through there. Q. Was that the only reason that makes you think you didn't look at them? A. That's the only reason,—because I had my mind fixed on going there, and I went there. Q. Your eyesight was good at that time? A. Yes; better than it is now. Q. It was dark that night? A. Yes, sir; fair. It was dusk,—not as bright as day, not by any means. Q. Well, it was light enough so anybody could see what was going on there,—see the street and the people? A. The people standing on the walk, you could see them; yes. Q. And you could see people in the street, couldn't you? A. I didn't notice anybody in the street. Q. You could have seen— A. [interrupting]. If I was looking that way, I might; yes. Q. And you could see whether the street was torn up? A. Well, I didn't pay any attention to the street. Q. You stepped on the curbstone, did you? A. I don't know whether there was a curbstone there or not. Q. What? A. I didn't step on any curb, as I know of. Q. Wasn't there one there? A. I don't know whether there was a curb there or not. I didn't notice any. Q. Where did you go from McDonald's walk on to this cross walk? A. I went straight west. Q. Well, were you, or were you not, about in the center of the cross walk? A. I should judge, about in the center. Q. There was nothing there that obstructed your view at all as you came up to the corner of McDonald's drug store? You could see where this cross walk once had been or was? A. If I was looking for it, I might; yes. But I always propose to walk about in the center of the sidewalk."

The plaintiff testified further that he did not know of any change in the condition of the crossing until he fell into the excavation, and that he did not see any light at the time he fell. He also gave evidence tending to show that an arc

light was suspended over the middle of the cross street, but it swung down very low that night, to light the workmen in the middle of the square, and that objects easily came between it and the crossing, so as to throw the walk into shadow; that at times it did not burn evenly, but sputtered and threw shadows.

The court below, on the plaintiff's own testimony, should have directed the verdict in favor of defendant. Counsel for plaintiff, however, contend that the case is governed by Dundas *v.* City of Lansing, 75 Mich. 509, 42 N. W. 1011, 5 L. R. A. 143; Argus *v.* Village of Sturgis, 86 Mich. 344, 48 N. W. 1085; Brezee *v.* Powers, 80 Mich. 172, 45 N. W. Finn 130; *v.* City of Adrian, 93 Mich. 507, 53 N. W. 614; Graves *v.* City of Battle Creek, 95 Mich. 266, 54 N. W. 757, 19 L. R. A. 641. The circumstances of the injury in each of those cases were very different from the present case. In Dundas *v.* City of Lansing it appeared that the plaintiff was not thinking of the hole in the walk. The night was dark and stormy, and a slight snow or mist was falling. It was there said, however: "Many cases are reported where, under the circumstances attending the transaction, courts have rightly held that the party was not entitled to recover where the danger was apparent and known, and the injury resulted from his own carelessness and inattention." In Brezee *v.* Powers it appeared that the night was quite dark. There was nothing to call the plaintiff's attention to the fact of the opening into which he fell. In Finn *v.* City of Adrian it appeared that the plaintiff knew eight days before the accident that the walk had been partially torn up, and that the street was being paved. That was held not sufficient to charge her with contributory negligence in attempting to cross the walk, as she had the right to assume, in the absence of any danger signal, that the walk had been placed in good condition. In Graves *v.* City of Battle Creek the theory of the plaintiff was, and she gave testimony tending to show, that just before she stumbled over the plank in question she heard a whistle, and became frightened and hurried on. It

was said: "The court should have submitted to the jury the question whether this circumstance, coupled with the fact that it was in the nighttime, was sufficient to excuse her immediate attention to the walk at the exact time of the injury." In the present case the plaintiff knew that the street was being paved. He saw the teams and men there at the very time (although it was in the night) doing the work of grading, and he says that when he went down he stopped and looked at the team plowing; and, being asked if he "noticed that they had the whole corner ripped up," he answered: "I didn't pay any attention to it. I was looking at the team." In a few moments afterwards he returned. He was asked if on his return he could see if the street was torn up, and replied: "Well, I didn't pay any attention to the street." He was asked if he stepped on the curbstone, and answered: "I don't know whether there was a curbstone there or not. I didn't step on a curbstone, as I know of. I didn't notice any." It is apparent from the testimony of plaintiff that, had he looked, he could have seen that the street was torn up. He did know that it was being torn up, and that the men were working there. He attempted to cross without giving any attention to the condition of the street, or taking any precaution to avoid injury. It was held in Irion *v.* City of Saginaw (Mich.), 79 N. W. 572, that one who had in mind the bad condition of the cross walk leading from the street curb to the side walk, and knew that if she went over it she must exercise great care, and take the chances of going over in safety, and who by stepping aside a few feet could pass along without going on the walk, was barred by contributory negligence from recovering for injuries received in crossing it. In Church *v.* Village of Howard City, 111 Mich. 298, 69 N. W. 651, it was held that a pedestrian perfectly familiar with existing conditions was, as matter of law, guilty of contributory negligence precluding a recovery for injuries sustained by falling from the sidewalk, unguarded by a rail, into an excavation, during the nighttime, where, instead of guiding

himself by a rail on the other side, he directed his course by a light which proved not to be the one he supposed it to be. In Grandorf *v.* Railway Co., 113 Mich. 496, 71 N. W. 844, it was held that one who in the daytime attempted to pass over stones which she saw scattered over the sidewalk assumed the risk of injury. While the present case does not present the exact state of facts presented in those cases, it does present facts which lead us to the conclusion that, had the plaintiff exercised the least care, he would not have met with the accident complained of. He walked heedlessly into danger, knowing that the street was being torn up. The judgment must be reversed, and no new trial ordered.

HOOKER, MOORE, and GRANT, JJ., concurred.

MONTGOMERY, C. J. (dissenting). The concurrence of my Brethren in the view that there was no case for the jury would lead me to doubt my judgment, were it not for the fact that the supreme court of Massachusetts has but recently dealt with a case which in principle is not to be distinguished from the present. In O'Neil *v.* Hanscom, 56 N. E. 587, the court uses this language: "Assuming, according to the sixth request, that there were around and at or near the trench sufficient lights, horses, and barriers to warn the plaintiff of danger, and the plaintiff saw them and did not heed them, it cannot be said, as matter of law, that he thereby assumed the risk of falling into a trench of whose existence, so far as appears from the instruction requested, he were, or might have been, ignorant." In the present case it is true that the fact that the plaintiff knew that the authorities were working in Burdick street and in Main street may furnish ground for a strong inference that he knew that the crossing of Burdick had been removed, but does it conclusively show that he knew it? I think not. He testifies that when he last knew the fact about it the crossing was intact. I do not think it should be held, as matter of law, that, because he knew that teams were at work on the opposite side of Main street, he must be assumed to have known, or

Notes

bound in law to have known, that the cross walk had been removed and left in a dangerous condition. No barrier was erected, and no direct warning given. I think the case was one for the jury.

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NOTES.

**Using Defective Street with Knowledge of Defect—Contributory Negligence.**—One using a street or sidewalk with knowledge of a defect therein is not guilty of contributory negligence as a matter of law.

*Canada.*—Gordon *v.* Belleville, 15 Ont. 26, 20 Am. & Eng. Corp. Cas. 341.

*United States.*—N. Y. Life Ins. Co. *v.* Savage, 58 Fed. Rep. 338.

The contributory negligence of a person using one part of a defective sidewalk rather than another is a question for the jury. City of Lincoln *v.* Power, 151 U. S. 436.

*District of Columbia.*—District of Columbia *v.* Crumbaugh, 13 App. D. C. 553.

*Alabama.*—In Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422, it was held that it was not contributory negligence as a matter of law for a person using a sidewalk to attempt to pass a defect which had long existed and of which he knew, there being room for safe passage, and no sidewalk on the opposite side of the street.

*California.*—Higgins *v.* Williams, 114 Cal. 176.

*Colorado.*—Highlands *v.* Raine, 23 Colo. 295.

*Idaho.*—Giffen *v.* Lewiston (Idaho), 55 Pac. Rep. 545.

*Illinois.*—Chicago *v.* Fitzgerald, 75 Ill. App. 174; City of Streator *v.* Chrisman (Ill.), 4 Mun. Corp. Cas. 225; City of Flora *v.* Nanney, 136 Ill. 45; Village of Clayton *v.* Brooks, 150 Ill. 97; City of Sandwich *v.* Dolan, 141 Ill. 430; Aurora *v.* Hillman, 99 Ill. 65; E. St. Louis *v.* Donahue, 77 Ill. App. 574; Aurora *v.* Dale, 90 Ill. 46; Peoria *v.* Gerber, 68 Ill. App. 255; City of Litchfield *v.* Anglim, 83 Ill. App. 55; Coffeen *v.* Lang, 67 Ill. App. 359; Streator *v.* Hamilton, 61 Ill. App. 509; St. Charles *v.* Hannon, 56 Ill. App. 515; Mt. Carmel *v.* Blackburn, 53 Ill. App. 658; Sumner *v.* Scaggs, 52 Ill. App. 551.

*Indiana.*—Williamsport *v.* Lisk, 21 Ind. App. 414; Frankfort *v.* Coleman, 19 Ind. App. 368; Huntingburgh *v.* First, 15 Ind. App. 552; Town of Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Henry County Tp. Co. *v.* Jackson, 86 Ind. 111, 44 Am. Rep. 274.

The fact that the pedestrian was aware of the defect in the street before the accident, for which he seeks to recover, will not prevent recovery, unless it appears that he knew that such defect was of a

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dangerous character. City of Huntington *v.* Folk (Ind.), 2 Mun. Corp. Cas. 688.

*Iowa.*—Kingsley *v.* Mulhall, 95 Iowa 754; Sylvester *v.* Town of Casey (Iowa), 81 N. W. Rep. 455; Graham *v.* Oxford, 105 Iowa 705; Nichols *v.* Laurens, 96 Iowa 388; Hoover *v.* Town of Mapleton (Iowa), 81 N. W. Rep. 776; Harvey *v.* City of Clarinda (Iowa), 4 Mun. Corp. Cas. 66.

In Barnes *v.* Marcus, 96 Iowa 675, it was held not contributory negligence *per se* for one to use a defective sidewalk with knowledge of such defect where he did not know that it was dangerous and that there was another way.

*Kansas.*—Kansas City *v.* Manning, 50 Kan. 373; Osage City *v.* Brown, 27 Kan. 74; Olathe *v.* Mizee, 48 Kan. 435, 30 Am. St. Rep. 308; Emporia *v.* Schmidling, 33 Kan. 485, 7 Am. & Eng. Corp. Cas. 86.

*Massachusetts.*—Lyman *v.* Amherst, 107 Mass. 339; Norwood *v.* Somerville, 159 Mass. 105; Reed *v.* Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; Pox *v.* Chelsea, 171 Mass. 297.

A husband's previous knowledge of a defect in a street over which his wife intends to pass, and his failure to warn her thereof will not defeat the action by them to recover for injuries to her received while crossing such defect. Street *v.* Holyoke, 105 Mass. 82, 7 Am. Rep. 500. See also, Nanticoke *v.* Warne, 106 Pa. St. 373.

*Michigan.*—Urtel *v.* City of Flint (Mich.), 4 Mun. Corp. Cas. 227; Lowell *v.* Watertown, 58 Mich. 568; Sias *v.* Reed City, 103 Mich. 312; Schwingschlegl *v.* City of Monroe, 113 Mich. 683; Germaine *v.* Muskegon, 105 Mich. 213.

*Minnesota.*—Estelle *v.* Lake Crystal, 27 Minn. 243; Lyons *v.* Red Wing, 76 Minn. 20; Nichols *v.* Minneapolis, 33 Minn. 430, 8 Am. & Eng. Corp. Cas. 585; McKenzie *v.* Renshaw, 30 Minn. 456.

*Missouri.*—Flynn *v.* Neosho, 114 Mo. 567; Cohn *v.* Kansas City, 108 Mo. 387; Waltemeyer *v.* Kansas City, 71 Mo. App. 354; Stevens *v.* Walpole, 76 Mo. App. 213; Graney *v.* St. Louis, 141 Mo. 180; Barr *v.* Kansas City, 105 Mo. 550, 35 Am. & Eng. Corp. Cas. 485; Loewer *v.* Sedalia, 77 Mo. 431; Culverson *v.* Marysville, 67 Mo. App. 383; Smith *v.* Butler, 48 Mo. App. 663.

*Montana.*—Cannon *v.* Lewis, 18 Mont. 402.

*New Hampshire.*—Griffin *v.* Auburn, 58 N. H. 121.

*New York.*—Weed *v.* Village of Ballston Spa, 76 N. Y. 329; Bullock *v.* New York, 99 N. Y. 654, 8 Am. & Eng. Corp. Cas. 583; Bassett *v.* Fish, 76 N. Y. 303; Dale *v.* Syracuse, 71 Hun (N. Y.) 449; Evans *v.* Utica, 69 N. Y. 166, 25 Am. Rep. 165.

*North Carolina.*—Thompson *v.* Winston, 118 N. Car. 662.

*North Dakota.*—Ouverson *v.* Grafton, 5 N. Dak. 281.

*Ohio.*—Toledo *v.* Center, 16 Ohio C. C. 308.

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Plaintiff must have apprehended danger from the defect, to render him guilty of contributory negligence in using the sidewalk with knowledge thereof. City of Cincinnati *v.* Frazer, 9 Ohio C. C. 487.

One attempting to pass over a defect in a street which he could have easily avoided is guilty of such contributory negligence as will prevent recovery for his injuries even though the city was negligent in allowing the existence of such defect. Bond Hill *v.* Atkinson, 16 Ohio C. C. 477.

*Pennsylvania.*—Allen *v.* Du Bois, 181 Pa. St. 184; Feather *v.* Reading, 155 Pa. St. 187; Kingston *v.* Gibbons (Pa.), 15 Am. & Eng. Corp. Cas. 229; Hill *v.* Tronesta, 146 Pa. St. 11; Brendlinger *v.* New Hanover, 148 Pa. St. 93.

In City of Erie *v.* Magill, 101 Pa. St. 616, 2 Am. & Eng. Corp. Cas. 579, the court believing that the plaintiff not only had knowledge of the obstruction before the day of the accident, but also that she actually saw it just before attempting to cross it, as her testimony showed, held that she was guilty of contributory negligence as a matter of law.

*Texas.*—Ft. Worth *v.* Johnson, 84 Tex. 137; Hillsboro *v.* Jackson, 18 Tex. Civ. App. 325.

*Utah.*—Dwyer *v.* Salt Lake City, 19 Utah 521.

*Virginia.*—The contributory negligence of a child using a defective street is a question for the jury. City of Roanoke *v.* Shull (Va.), 2 Mun. Corp. Cas. 667.

*Washington.*—McQuillan *v.* Seattle, 10 Wash. 464, 45 Am. St. Rep. 799.

*Wisconsin.*—Salzer *v.* Milwaukee, 97 Wis. 471; Kenworthy *v.* Ironton, 41 Wis. 647.

Same—Same—Care Required.—The degree of care required of one using defective street with knowledge of its condition is measured by the danger to which he is exposed. City of Spring Valley *v.* Gavin (Ill.), 54 N. E. Rep. 1035.

Care proportioned to the danger is the ordinary care required of one using a defective sidewalk with knowledge of such defect. Noble *v.* Hanna, 74 Ill. App. 564; Hoover *v.* Town of Mapleton (Iowa), 81 N. W. Rep. 776. See Hanlon *v.* Keokuk, 7 Iowa 488; Nave *v.* Flack, 90 Ind. 205; City of Huntingburg *v.* First, 15 Ind. App. 552; Koch *v.* Ashland (Wis.), 60 N. W. Rep. 990; Dittrich *v.* Detroit, 98 Mich. 245; Emporia *v.* Schmidling, 33 Kan. 485, 7 Am. & Eng. Corp. Cas. 486; Gordon *v.* Richmond, 83 Va. 436, 18 Am. & Eng. Corp. Cas. 251; Gosport *v.* Evans, 112 Ind. 133; Salem *v.* Walker, 16 Ind. App. 687.

The mere fact that a person knows that a sidewalk is in a defective and dangerous condition does not, as a matter of law, impose

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upon him the duty of abandoning the use of the street, or else use it at his peril. He is bound in such a case to use ordinary care, and no higher degree of care; that is, he is bound to use reasonable care, in view of all the circumstances of the case, including his previous knowledge of the condition of the walk. Lyons *v.* City of Red Wing (Minn.), 1 Mun. Corp. Cas. 483, and see *notes*, p. 489.

One passing along the sidewalk of the public street must use such care as the circumstances require; and it is error to instruct a jury that ordinary care to avoid danger need only be used for the danger is known and seen. Quinby *v.* Filter (N. J.), 2 Mun. Corp. Cas. 23, and see *note*, p. 27.

In Fuller *v.* Hyde Park (Mass.), 37 N. E. Rep. 782, it was held that a person using a public sidewalk is not bound to the highest degree of care possible, but only such care as an ordinary prudent person would have used under such circumstances and that the question as to whether such care was used is for the jury.

In Duthie *v.* Town of Washburn, 87 Wis. 231, it was held that the care required of a person walking over a defective crosswalk is ordinary care, or such care as persons of ordinary care and prudence observe. Langan *v.* Atchison, 35 Kan. 318, 12 Am. & Eng. Corp. Cas. 650.

Where a defect existed in the sidewalk of a city, the only duty imposed on one using the walk is to use ordinary care and caution to avoid being injured. Pitman *v.* El Reno, 2 Okla. 414, 47 Am. & Eng. Corp. Cas. 29.

In Weston *v.* Troy, 139 N. Y. 281, it was held that the presumption which a traveler may indulge, that the streets of a city are safe and which excuses him from being on the lookout for defects, does not apply where the danger is known and obvious.

One knowing the defective condition of a street must be governed in his care by such knowledge and cannot act on the presumption that it is safe. Cowie *v.* City of Seattle (Wash.), 62 Pac. Rep. 121.

**Same—Same—Care Exercised Is Question for Jury.**—The question of the care exercised by a person using a street with knowledge of a defect therein is for the jury. Dwyer *v.* Salt Lake City (Utah), 57 Pac. Rep. 535.

It is not error to refuse to instruct that if a person using a street with knowledge of a defect therein attempted to cross over instead of going around such defect that he cannot recover, as plaintiff's care in so doing is a question for the jury. Cassmann *v.* City of St. Louis (Mo.), 54 S. W. Rep. 513.

The weight of the fact that plaintiff had forgotten the defect is to be considered by the jury in determining plaintiff's negligence. Cowie *v.* City of Seattle (Wash.), 62 Pac. Rep. 121; Dempsey *v.* Rome, 94 Ga.

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420; Knoxville *v.* Cox, 103 Tenn. 368; Doan *v.* Willow Springs, 101 Wis. 112.

**Same—Same—What Constitutes.**—One whose negligence, in exposing himself to risk of injury from a defect of which he had knowledge, caused an injury to him, cannot recover. District of Columbia *v.* Ashton, 14 App. D. C. 571.

The contributory negligence of one attempting to use a street on a dark night, knowing that there is no barrier between the street and an adjacent lot several feet below the street grade, will prevent recovery, where the use of the other side of the street would have been equally convenient. McGraw *v.* Friend, etc., Lumber Co., 120 Cal. 574. See also, Church *v.* Howard City, 111 Mich. 298.

No recovery can be had for injuries caused by a defect in the sidewalk of which the plaintiff knew and about which she had forgotten. Neal *v.* Town of Marion (N. Car.), 35 S. E. Rep. 812.

There can be no recovery for injuries received by one from falling in an excavation near a street while walking along such street at night absorbed in thought, where he knew of the existence of the excavation, having once before fallen in it, and there being no necessity for his going near it. Walker *v.* Reidsville, 96 N. Car. 382, 18 Am. & Eng. Corp. Cas. 271; Barce *v.* Shenandoah, 106 Iowa 426.

One knowing of a defect and conscious at the time of risk of injury therefrom cannot recover for injuries received while attempting to pass over such defect instead of going around. Irion *v.* City of Saginaw (Mich.), 79 N. E. Rep. 572.

The contributory negligence of a person attempting to pass over a defect extending partly across a sidewalk instead of going around it as she had customarily done will prevent recovery for injuries received thereby. Nicholas *v.* Peck, 20 R. I. 533.

The contributory negligence of the plaintiff, as appearing from her evidence, in passing along the street which she knew was out of repair and dangerous, on a dark night and without any light, will defeat her recovery, although the city was negligent in failing to provide signal lights on the obstructions in the street. Hesser *v.* Grafton, 33 W. Va. 547, 31 Am. & Eng. Corp. Cas. 117.

In Rome *v.* Baker, 107 Ga. 347, 33 S. E. Rep. 406, it was held that a person having a stiff leg is guilty of contributory negligence in attempting to pass over a defect which he could have easily avoided.

No recovery can be had for one injured by driving over a dirt heap while going on a dark night, at a rapid pace, on a street in which he knew that there were excavations, although there were no lights to guard such excavation. Morgan *v.* Village of Penn Yann, 59 N. Y. Supp. 504.

Where, in consequence of the falling in of a gate forming a part of a railing protecting an excavation in and along the margin of a

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public sidewalk in a town, the plaintiff was thrown into the excavation and injured, there was no error in declining to charge the jury that, if the plaintiff intentionally leaned upon the gate, he could not recover from the town, nor in instructing the jury that it was a question for them whether or not, under all the circumstances, the plaintiff was making a proper and legitimate use of the gate. Mayor, etc., of Jackson *v.* Boone (Ga.), 47 Am. & Eng. Corp. Cas. 54. See also, City of Whitewright *v.* Taylor (Tex. Civ. App.), 57 S. W. Rep. 311.

**Same—Same—Where There Is a Safe Way.**—The contributory negligence of one using a defective street with knowledge of its condition and where there was another safe way, is for the jury. Carstesen *v.* Stratford, 67 Conn. 428; Cook *v.* Atlanta, 94 Ga. 613; Peoria *v.* Walker, 47 Ill. App. 182; Lovenguth *v.* Bloomington, 71 Ill. 238; Mt. Sterling *v.* Crummey, 73 Ill. App. 572; Clayton *v.* Brooks, 150 Ill. 97; Fowler *v.* Linquist, 138 Ind. 566; Hoover *v.* Town of Mapleton (Iowa), 81 N. W. Rep. 776; Cosner *v.* Centerville, 90 Iowa 33; Murphy *v.* City of Worcester, 159 Mass. 546; Coffin *v.* Palmer (Mass.), 38 N. E. Rep. 509; Loewer *v.* Sedalia, 77 Mo. 431, 2 Am. & Eng. Corp. Cas. 658; Stokes *v.* Ralpho Twp., 187 Pa. St. 333; Smith *v.* Newcastle, 178 Pa. St. 298; Douglass *v.* Monongahela City W. Co., 172 Pa. St. 435; Wellman *v.* Susquehanna Depot, 167 Pa. St. 239; Biggs *v.* West Newton (Pa.), 30 Atl. Rep. 204; Chilton *v.* Carbondale, 160 Pa. St. 463; Kleng *v.* Buffalo, 72 Hun (N. Y.) 541; Houston, etc., R. Co. *v.* Dunn, 17 Tex. Civ. App. 687; Cairncross *v.* Pewaukee, 86 Wis. 181.

**Using Icy Sidewalk Is Contributory Negligence Per Se.**—It is contributory negligence *per se* to use an icy sidewalk, where one has knowledge of its condition at the time and can avoid such use. Howcy *v.* Fisher (Mich.), 80 N. W. Rep. 1004; Wilson *v.* Charlestown, 8 Allen (Mass.) 693, 85 Am. Dec. 693; Thomas *v.* Mayor, etc, 28 Hun (N. Y.) 110; Schaefler *v.* City of Sandusky, 33 Ohio St. 246, 31 Am. Rep 533; Quincy *v.* Barker, 81 Ill. 300; Belton *v.* Baxter, 54 N. Y. 245; Durkin *v.* Troy, 61 Barb. (N. Y.) 437; Chicago *v.* Bixby, 84 Ill. 82; Aurora *v.* Pulfer, 56 Ill. 270; Horton *v.* Ipswich, 12 Cush. (Mass.) 488; Centralia *v.* Krouse, 64 Ill. 19; Marshall *v.* Belle Plaine, 106 Iowa 508; Chicago *v.* Richardson, 75 Ill. App. 198; Boyle *v.* Mahoney City, 187 Pa. 1; Black *v.* Manistee, 107 Mich. 60; Depere *v.* Hibbard (Wis.), 80 N. W. Rep. 933.

But in other cases it has been held that the plaintiff's knowledge of the icy condition of a sidewalk did not render him guilty of contributory negligence in attempting to use it. Beck *v.* City of Buffalo, 63 N. Y. Supp. 499; Evans *v.* City of Utica, 69 N. Y. 166, 25 Am. Rep. 165; Dewire *v.* Bailey, 131 Mass. 169, 41 Am. Rep. 219.

## YOUNG

*v.*

## CITY OF KANSAS CITY.

*(Supreme Court of Missouri, Dec. 12, 1899.)*

**Constitutionality of Statute Requiring City to Pay Salary of Officer of State Court.**—A statute of Missouri provides that "in cities having a population of over one hundred thousand inhabitants, courts having jurisdiction in cases of felony, shall have a stenographic reporter, such reporter to be appointed by the court"; and that his salary shall be payable from the city's funds. *Held*, that the statute was constitutional when applied against defendant in an action against Kansas City to compel it to pay from the city funds the salary of a stenographic clerk appointed by a state court having jurisdiction in cases of felony, and located in the city, as it is within the general powers of a state to require a municipal corporation to provide funds for the support of courts created for the territory occupied by the municipality.

**Statutes—Province of Court.**—It is not within the province of a court to inquire into the expediency of a constitutional statute.

APPEAL by defendant from Jackson county circuit court. *Affirmed.*

Sections 1, 2, and 8 of the act of March 19, 1881 (Acts 1881, p. 106), which act is claimed to be unconstitutional, read as follows:

"Section 1. In cities having a population of over one hundred thousand inhabitants, courts having jurisdiction in cases of felony, shall have a stenographic reporter, such reporter to be appointed by the court, to hold his office from month to month, during the pleasure of said court, or until removed for cause shown, as hereafter provided.

"Sec. 2. The stenographer so appointed shall receive a monthly salary of one hundred and fifty dollars, payable at the end of each month by the treasurer of said city, upon

presentation to said treasurer of vouchers duly approved and certified by the clerk of said court."

"Sec. 8. An emergency having arisen by reason of the large number of causes now pending in the criminal courts, and the evidence being voluminous, and there being no provisions to expedite the proceedings, in criminal causes, it is hereby declared that this act shall take effect from and after its passage."

*R. B. Middlebrook*, for appellant.

*Frank Titus*, for respondent.

GANTT, P. J. This is an action by plaintiff for his salary for the months of June, July, August, September, October, November, and December, 1894, at the rate of $150 per month, aggregating $1,050, and 6 per cent. interest from the date of his demand of the city treasurer, and his refusal to pay the same. The petition avers that Kansas City was at the times mentioned, and is now, a city of over 100,000 inhabitants, and that the criminal court of Jackson county was at the dates mentioned, to wit, throughout the year 1894, a court duly created by the laws of Missouri, with jurisdiction to hear and determine cases of felony, and by law was required to hold and did hold three terms of court each year in Kansas City, the defendant herein. Plaintiff further alleged that on June 1, 1894, he was duly appointed by said criminal court stenographic reporter for said criminal court, to act for and at the terms aforesaid by virtue of his said appointment; that he duly qualified and performed his duties as such stenographer, and by virtue of the law creating his office he was entitled to receive of and from Kansas City a salary of $150 per month during the term of his employment; that he served as such stenographer for said court during the months of June, July, August, September, October, November, and December, 1894, and his salary for said months was duly certified by the clerk of said court, and was by plaintiff presented to the treasurer of Kansas City for payment, and payment was refused. Kansas

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City challenged and denied the constitutionality of article 5 of chapter 153 of the Revised Statutes of 1889, under which plaintiff was appointed, and by virtue of which his salary is fixed, and asked the circuit court to instruct that said law was unconstitutional and void as to Kansas City, which declaration the court refused, and gave judgment for plaintiff.

In State *v.* Wofford, 121 Mo. 61, 25 S. W. 851, this court held that the act of March 19, 1881, afterwards incorporated into the Revised Statutes of 1889 under the title of article 5 of chapter 153, applied to Kansas City, and the criminal court of Jackson county; that it was a general law and constitutional. In that case it was urged that it would do violence to the ordinary signification of language to speak of said court as "a court in a city of one hundred thousand inhabitants," but we answered them, as we answer now, that all courts in this state which have jurisdiction to try felonies, of whatever grade, are state courts. "They are not the creatures of municipal government or control, and, when one of these courts is appointed by law to hold and does hold its sessions in a city of one hundred thousand inhabitants, it meets every requirement of the statute, verbal or substantial, to bring it within the terms of section 8252, Rev. St. 1889, as 'a court having jurisdiction in cases of felony' 'in cities of one hundred thousand inhabitants.' In no other way can such a court be in such a city, nor are we at liberty to interpolate into the statute a meaning which would render it obnoxious to the constitutional prohibition." We have then a court of the state created by law to hear and punish crime in Kansas City. That it was and is entirely competent for the legislature to require the salary of an official of that court to be paid out of the treasury of Kansas City, and be a charge upon the revenues of said city, we have no sort of doubt. In so doing it will not disturb the chartered rights of Kansas City as to her municipal affairs. She is still a part of the state, and subject to its constitution and laws, and liable as other subdivisions of the state to support its laws and bear the burdens of government; and, on the

other hand, the states owes her people the same protection that it guaranties every other city and portion of the state. Courts are held by judges and officers of the state for the state, and it is incumbent upon the legislature to provide for their maintenance. This power has never been delegated to Kansas City or any other city. This act does not seek to amend the charter of Kansas City or interfere in its municipal affairs. The adoption of the charter is in no wise affected by this statute. The state in enacting it was simply exercising the general power over said city that it exercises over every other portion of its territory. The duty of providing courts of justice is a governmental function of the state alone, and she can require a given locality to provide funds for the support of those courts created for such locality. State *v.* Mason (not yet officially reported), 54 S. W. 524. This was held long ago in Hamilton *v.* St. Louis County Court, 15 Mo. 20, and reaffirmed in State *v.* Field, 119 Mo. 593, 24 S. W. 752, in which last case it was said, "We deem it within the power of the legislature to impose a tax upon a particular subdivision or municipality of the state, when in its judgment it is for the benefit of that locality as well as the state at large." It does not admit of argument that a great city like Kansas City imperatively requires a criminal court. As to the complaint that it imposes a burden that the county should bear in part, our answer is that we are dealing with the constitutional power of the legislature now to pass this law. It is not our province to inquire into its expediency. However, it does seem the legislature recognized that the burden was unequal, and in 1895, by Laws Mo. 1895, p. 272, amended the law so that, since March 18, 1895, the stenographer in Jackson county, by section 8253 as amended, receives his salary from the county treasury. It follows that article 5, c. 153, Rev. St. 1889, is not unconstitutional, and the circuit court properly held the city liable for plaintiff's salary for the months sued for, and its judgment is affirmed.

BURGESS, J., concurs. SHERWOOD, J., absent.

CITY OF NEWPORT *et al.*

*v.*

HORTON.

(*Supreme Court of Rhode Island, Aug. 2, 1900.*)

**Statutes—Constitutionality.**—A statute may be void in one part and valid in other parts, unless the parts are so intimately connected that one cannot stand without the other.

**Municipal Corporations—Legislative Control of Police Department—Constitutionality of Statute.***—The statute in question provided for the appointment by the governor of three commissioners, who should be qualified electors of the petitioning city, and, as a board, have authority to appoint, remove, organize, and control the chief of police of the city, and its police force generally, and have full charge of liquor licenses and the licensing of pawnbrokers, billiard and pool rooms, hawkers and peddlers, shows, and a large list of other matters which require more or less police supervision, and to expend a sum not exceeding a specified amount, and such further sum as the city council should appropriate, for said purposes, to be paid by the city. And power was also given to the board to make ordinances for the management of the police, with power to impose penalties of fine and imprisonment, to summon witnesses, and to punish for contempt. *Held*, that such a board however appointed, is an agency of the state, and not of the municipality; and that, assuming the city had the same rights as municipal corporations of other states, its right to the sole control of its police force had not been so reserved as to bring it within art. 1, § 23, or art. 4, § 10, of the state constitution; and that such statute was not unconstitutional on the ground of interference with the right of the city to local self-government, so far as the appointment of a chief of police by such commissions was concerned.

PETITION in the nature of *quo warranto* to try the title to the office of chief of police of the petitioning city. *Demurrer to petition sustained.*

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*See notes at end of case.

*J. Stacy Brown*, *City Sol.*, and *Arnold Green*, for plaintiffs.

*Amasa M. Eaton*, for defendants.

Case Stated.

STINESS, C. J. In May last the general assembly passed an act to establish a board of police commissioners for the city of Newport. Pub. Laws, c. 804. It provided for the appointment by the governor, with the advice and consent of the senate, of three commissioners, who should be qualified electors of Newport, with terms of office of two, four, and six years. This board has authority to appoint, remove, organize, and control the chief of police and the police force generally; to make rules and regulations therefor; to have full charge of liquor licenses and the licensing of pawnbrokers, billiard and pool rooms, hawkers and peddlers, shows, and a large list of other matters which require more or less police supervision. The board is authorized to expend a sum not exceeding $36,000, and such further sum as the city council of Newport may appropriate, for said purposes, to be paid by the city. Power is also given to the board to make ordinances for the management of the police, with power to impose penalties of fine and imprisonment, to summon witnesses, to punish for contempt, and to do many things which need not now be specified. The board was duly appointed by the governor, and organized under this act, and it appointed Benjamin H. Richards as chief of police in place of Pardon S. Kaull, who had been elected to that office for the term of one year by the city council of Newport in January last. Said Kaull claims the office under said election, and, under Gen. Laws, c. 263, this petition is filed in the nature of *quo warranto*, to determine the title to the office.

The ground upon which the petition rests is that the act appointing the commission is unconstitutional. Several grounds of unconstitutionality are urged,—such as the power to punish for contempt, to compel the production of books and papers, the exercise of legislative powers, etc., which need not be considered at this time. The single question

presented in this petition is whether the general assembly has power to create a police commission, to be appointed by the governor, which can appoint a chief of police. If it has such power, it is quite immaterial to this question what its power may be in regard to other matters which are clearly separable and distinct from that. A statute may be void in one part and valid in other parts, unless the parts are so intimately connected that one cannot stand without the other. In Penniman's Case, 103 U. S. 714, 26 L. Ed. 602, which went up from this court, the first section of the act, alleged to be unconstitutional, provided that no person should thereafter be imprisoned, or be continued in prison, nor his property be attached upon an execution issued on a judgment against a corporation of which such person was a stockholder. This was contrary to the law existing at the time when the creditor obtained a judgment against the corporation in which Penniman was a stockholder, and the objection was that it was invalid because it impaired the obligation of a contract. The case, however, only involved the release of Penniman from imprisonment. The court therefore said: "It is only necessary to consider that part of section 1 of the act (Laws 1877, c. 600) which relieves a party from imprisonment upon the execution. Penniman invoked that provision, and no other. He was merely relieved from imprisonment, and it is that, and that only, of which Tweedle complains." The court then quoted from Keokuk Northern Line Packet Co. *v.* City of Keokuk, 95 U. S. 80, 24 L. Ed. 377, in which the court said: "Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the constitution, provided the allowed and prohibited parts are severable. It may be conceded that the ordinance is too broad, and that some of its provisions are unwarranted. When these provisions are attempted to be enforced, a different question may be presented." In State *v.* Snow, 3 R. I. 64, where a part of the act in question, which related to another offense than that charged against the defendant, was

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claimed to be invalid, JUDGE BRAYTON said that it was a very wholesome rule that no one can take advantage of the unconstitutionality of an act who has no interest in and is not affected by it. This language related to provisions of the act which did not affect the party who objected to them in the case before the court. The rule as stated in Cooley, Const. Lim. (6th Ed.) 214, is that a law will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the constitution forbids. See, also, State *v.* Amery, 12 R. I. 64; 6 Am. & Eng. Enc. Law (2d Ed.) 1088, note 3. The question in this case being that of title to the office of chief of police of Newport, it is quite immaterial to the decision of that question whether the police commission can lawfully exercise other powers which are conferred upon it by the act, and which are in no way involved in the case presented. Such powers are clearly severable from that of a police appointment.

We are not called upon to consider, nor can we properly do so, any question of unconstitutionality in the act before us except so far as it affects the power of appointment of a chief of police and the control of the police department. If the commission had the power to appoint a chief of police, that settles this case, and it is of no consequence what their powers may be in other respects. Of course, we understand that the argument on this line was pressed by the petitioners in order to show that unconstitutionality permeated the whole act; but we cannot give effect to such an argument, because it is very clear that the parts are not inseparable, and hence that our decision can only rest upon the parts that affect this case. Confining our attention, then, to the provisions of the constitution which affect the power of the general assembly to control the police of towns and cities, the petitioners claim that the act in question infringes the rights of local self-government, fundamental and historic, in the state of Rhode Island, enjoyed and preserved from the settlement of its first four towns to the adoption of its con-

stitution, which the constitution recognizes, and on which it is built; and that this right is one of the reserved rights retained by the people under Const. art. 1, § 23, and *Id.* art. 4, § 10. The question has been ably and elaborately argued on this line. The major premise is that four independent towns, governing themselves in all respects, formed the colony, in doing which they gave up none of their rights of self-government; that they never had given them up, and hence such rights are retained by the people. We readily concede that the settlements in Providence, Portsmouth, and Newport were unique. Unlike other colonies, they were made before and without a charter of any kind. The settlers came upon land to which the crown of England had no title. They bought it of the Indians. They organized their governments. In Providence the organization was called a "town," in Portsmouth a "bodie politick," in Newport a "plantation." Whatever the name they chose, they were in fact independent sovereignties. They had no superior and no subordinate. The inhabitants of Warwick did not recognize the authority of these self-constituted governments, and did not organize at all until after the first charter had been obtained from the English parliament in 1643–44, and the colony had been organized under it in 1647. The form of government adopted under that charter was a federation of towns, rather than a colony. Legislation originated in the towns, and the general assembly had simply a power of approval or veto. Local self-government was preserved to its full extent. The reason for this was stated in a charter granted to Providence in March, 1648 (1 Col. Rec. R. I., 214): "Whereas the said towns of Providence, Portsmouth, Newport and Warwick are far remote from each other, whereby so often and free intercourse of help, in deciding of differences and trying of causes and the like, cannot easily and at all times be had and procured of that kind is requisite," therefore full power to govern and rule themselves is given, "always reserving to the aforesaid general assembly power

and authority to dispose the general government of that plantation as it stands in reference to the rest of the plantations, as they shall conceive, from time to time, most conducing to the general good of the said plantations." The charter of 1663 made a marked change in the conduct of public affairs. It concentrated power in the general assembly. It gave that body authority to admit freemen; to elect and constitute such offices and officers as they shall think requisite for the ordering and arranging the affairs of government; to make such laws as should seem to them meet for the government and ordering of the lands granted and the people inhabiting the same; to regulate the way and manner of all elections to offices; to prescribe and limit the numbers and bounds of cities and towns, as well as to do many other things, quite inconsistent with the powers reserved to towns under the first charter. The action of the assembly was in accordance with the increased power. For example, in March, 1666, it established town councils, to consist of six members, including the assistants from the town, and, as there were three assistants from Providence, elected by general vote, one-half of its town council might be elected by the votes of other towns. In March, 1669, in the case of a division in Providence, the assembly appointed a commission to call a town meeting, and to have charge of the election and the persons entitled to vote. In October, 1674, it transferred the probate of wills from the head officer of the town to the town council. 2 Col. Rec. R. I., 238–240. All laws were made by the assembly from that time on, and an inspection of them will show in how many ways the towns had advanced towards a stronger central government, and relinquished the absolute control of their own affairs which they originally possessed. New towns were created; town boundaries were changed; towns were required to keep highways in repair; regulations were imposed in regard to erecting buildings; fire districts were established within towns, with power to levy taxes; authority was given to establish police regulations, subject

to the laws of the state; and generally towns were treated as deriving their powers from the state, rather than from an independent right of local self-government. As to Newport, in May, 1784, without any request from the town, so far as appears, it was made a city, because, "under the present government of the said town, it hath been found impracticable to devise, consider, deliberate, and determine upon all such laws and regulations as the emergencies of said town may, from time to time, require." In October, 1786, "the petition of divers inhabitants of the city of Newport, praying that the incorporation act of said city may be repealed, and the charter annulled," was presented to the assembly, and in March, 1787, the petition was granted, the charter annulled, and the city was made a town. The charter of 1853 was submitted to the people. Even as early as 1659 the assembly ordered the towns to pay a part of the cost of building a prison in Newport. While this subject is more historical than legal, we have considered it to this length simply to show that the broad claim made and so urgently pressed by the petitioners cannot be sustained to the extent of holding that the constitution of the state must be interpreted according to an unwritten theory of local self-government, which so entered into its provisions as to make it controlling in construing those provisions. We do not find that the history of legislation in this state shows that the clause relating to the powers "retained by the people" necessarily implies that the general assembly has no right to pass a law affecting a particular town or city. Indeed, the counsel for the petitioners concede that the assembly may pass some such laws, but not to the extent of the one before us. If this much be granted, —and we do not see that it can be denied,—the question comes down to the validity of this particular law, so far as it affects the right to establish a police commission with power to appoint a chief of police.

Towns and cities are recognized in the constitution, and doubtless they have rights which cannot be infringed.

What the full limit and scope of those rights may be cannot be determined in the decision of this case. The court cannot properly go beyond the question before it. We assume that the towns and cities in this state have the same rights which towns and cities have in other states, under the prevalent form of state government. Our inquiry, therefore, is whether the establishment of police authorities by the state infringes the rights of self-government. Obviously, this must depend upon the status of a police officer. In Kelley *v.* Cook, 21 R. I. 29, 41 Atl. 571, this court has recently decided that he is an officer appointed to perform a public service, and in appointing him the mayor and aldermen of a city merely exercised one of the functions of government, in which the city had no special interest, and from which it derived no special benefit or advantage in its corporate capacity. A city, therefore, in preserving the public peace or enforcing the laws within its borders, is not acting for itself, or for its own inhabitants merely, but for the whole people; in other words, the state. That which affects a part affects the whole. No one could question the right of the state to quell a riot, and yet even that would affect only a locality, not the whole state. If, then, a police officer does not perform a purely municipal, but a state, duty, how can his appointment affect the right of self-government? He is serving the state in the execution of its laws, or those which have been specially made under its authority. Chiefs of police of the towns and cities are made members of the state police by Gen. Laws, c. 102, § 17. The status, therefore, of the officer whose title to office is now before us, would seem to be enough to settle this case, were it not for the control of the police force vested in the commission, which is clearly an essential part of the act. There have been many cases upon legislation affecting towns and cities, and, while there have been frequent expressions of opinion asserting in general terms the absolute right of local self-government as broadly as it is claimed in this case, yet the real line of

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decision in most cases other than those of express constitutional provisions is the one we have already suggested,—whether the officer is one for the state or purely municipal service. The supreme court of Michigan has been specially favored with this class of cases. In People *v.* Mahaney, 13 Mich. 481, an act constituting certain persons a police commission for the city of Detroit, embracing the powers conferred in the act before us, with others much more extensive, was held to be constitutional. After considering objections not applicable to this case, JUDGE COOLEY took up the objection to the act "on general principles, and especially because violating fundamental principles of our system, that governments exist by the consent of the governed, and that taxation and representation go together." The court held that the objection was answered by the representation of the people of Detroit in the legislature which passed the act, and in the election of the governor who appointed the board. JUDGE COOLEY said: "There is nothing in the maxim that taxation and representation go together, which requires that the body paying the tax shall alone be consulted in its assessment; and, if there were, we should find it violated at every turn in our system. The state legislature not only has a control in this respect over inferior municipalities, which it exercises by general laws, but it sometimes finds it necessary to interpose its power in special cases to prevent unjust or burdensome taxation, as well as to compel the performance of a clear duty." People *v.* Hurlbut, 24 Mich. 44, was a case of a board of public works for Detroit. The constitutionality of the act was discussed, but not decided. CAMPBELL, C. J., who held the act to be unconstitutional, distinguished the case from People *v.* Mahaney upon the ground that the general purposes of the police act were such as appertain directly to the suppression of crime and the administration of justice,—matters pertaining to the general policy of the state and subject to state management, while the public works act was evidently local and municipal. People *v.* Council of City of Detroit, 28

Mich. 228, involved the creation of a park commission, and, again distinguishing the case from People *v.* Mahaney, the court held that the people of other parts of the state had no right to dictate to the city of Detroit what fountains it should build, or what land it should buy for a park or boulevard, at its expense, for the recreation of its citizens. People *v.* Mayor of City of Detroit, 29 Mich. 343, was on the same subject. Drain Com'r *v.* Baxter, 57 Mich. 127, 23 N. W. 711, related to the authority of a drain commissioner to act outside of his township. Wilcox *v.* Paddock, 65 Mich. 23, 31 N. W. 609, held that the legislature had no power to authorize a judge of probate of one county to assess benefits upon lands outside of his county for a local improvement. Board of Metropolitan Police *v.* Board of Auditors of Wayne Co., 68 Mich. 576, 36 N. W. 743, held that the police commission of Detroit, paid for by the city, could not be assigned to duty in other townships. The Michigan cases therefore draw a clear line between local and state service. In People *v.* Draper, 15 N. Y. 532, an act establishing the Metropolitan police district was held to be constitutional; but it is to be observed that the constitution of New York authorized the legislature to appoint in any manner all officers, local or general, whose offices might thereafter be created by law. People *v.* Shepard, 36 N. Y. 285, was of the same character. People *v.* Albertson, 55 N. Y. 50, held an act to be unconstitutional creating the Rensselaer police district, which extended the police force of Troy, maintained at its expense, to other towns, because it conflicted with the provision: "All town, city and village officers whose election is not provided for by this constitution shall be elected by the electors of such cities, towns and villages." People *v.* Porter, 90 N. Y. 68, held that the clause of the constitution giving the legislature authority to establish inferior local courts was limited to courts as historically known within recognized territorial divisions of the state, and that it did not authorize the splitting up of a county, city, town, or village for that purpose. In these last two cases People *v.* Draper

and People v. Shepard were quite strongly criticised, but, as the points of decision were different, they were distinguished, but not overruled. In Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408, an act for reorganizing the police department of Albany was held to violate the clause referred to in People v. Albertson, because it gave a minority of the council a right to elect police commissioners, restricting their votes to two, when four were to be elected, and set up a partisan test of eligibility. State v. Denny, 118 Ind. 382, 21 N. E. 274, 4 L. R. A. 65, held an act to be unconstitutional which established, in cities of more than 50,000 inhabitants, a board of public works to have control of streets, sewers, lights, water supply, etc. People v. Lynch, 51 Cal. 15, related to assessments for improving a street. State v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624, affirmed in State v. Kennedy (Neb.), 83 N. W. 87, held that an act incorporating metropolitan cities, for which the governor should appoint fire and police commissioners, was violative of the right of local self-government. These include all the cases relied on by the petitioners in support of the principle that an act of the legislature establishing a police commission for a city takes away its right of self-government implied in the constitution. In all of them there have been very vigorous and cogent arguments in favor of the protection of that right, with which, in the main, we do not disagree. But it is evident from the points decided that, excepting in Nebraska, they have all involved a purely municipal office, or have turned upon some express prohibition in the constitution. With the exception stated, not one has denied the general power of the legislature to assume the control of the local police. In the cases cited Michigan has affirmed the power, Nebraska has denied it. The uniform decisions in other states, so far as they have come to our notice, have sustained the power. Following People v. Draper in 1857, came Mayor, etc., of City of Baltimore v. State (1860), 15 Md. 376, sustaining an act creating a board of police for the city of Baltimore. To the same effect was State v. St. Louis County

Court (1864), 34 Mo. 546; State *v.* Covington (1876), 29 Ohio St. 102; State *v.* Hunter (1888), 38 Kan. 578, 17 Pac. 177; Com. *v.* Plaisted (1888), 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142; Trimble *v.* People, 19 Colo. 187, 34 Pac. 981, sustained an act authorizing the governor to remove a member of a fire and police board, but under constitutional provisions that do not apply to this case. Burch *v.* Hardwicke, 30 Grat. 24, held that a chief of police was a state officer. The clear weight of authority sustains the right of the legislature to control police, and equally is sustained by sound reason. The proposition of the petitioners goes too far. It assumes that, because state control interferes at all with local control, it violates the principle of local self-government. In any system of government, towns, as well as individuals, must yield something of individual independence for the public good. The most important laws are made by the legislature, and agencies are created to enforce them. Ordinarily, the state makes use of existing agencies, like town or city officers, to do this; but none the less are they officers of the state. To say, therefore, that the state cannot assume control of these agencies in public affairs is to say that a town can nullify a state law which it does not approve by choosing officers who will not enforce it. This is not the national doctrine, and, for a stronger reason, it cannot be the state doctrine. Two replies to this statement can be made: First, that the state can appoint its own officers to enforce its laws. To this we reply that economy and expediency at once suggests the futility of having two sets of officers whose duty it is to do the same thing, and also that we see no more infringement of the right of self-government in appointing special state officers to execute a law than in requiring local officers to execute the same laws. It may also be said that the court should not assume that local officers will not do their duty. The court does not so assume. The legislature has evidently made the assumption by the action it has taken, and, assuming its power, the question of policy is one for the legislature exclusively. What the petitioners really claim is local

independence, rather than local self-government. The whole doctrine of the case is summed up in Burch *v.* Hardwicke, 30 Grat. 38, by STAPLES, J., after reviewing cases, as follows: "The distinction recognized in all of them is between officers whose duties are exclusively of a local nature and officers appointed for a particular locality, but yet whose duties are of a public or general nature. When they are of the latter character, they are state officers, whether the legislature itself makes the appointment or delegates its authority to the municipality. The state, as a political society, is interested in the suppression of crime, and in the preservation of peace and good order, and in protecting the right of persons and property. No duty is more general and all-pervading than this. It extends alike to towns and cities as to the country. It looks to the preservation of order and security in the state, at elections, and at all public places; the protection of citizens at railway stations, at steamboat landings; the enforcement of the law against intemperance, gambling, lotteries, violations of the Sabbath; and, in fine, the suppression of all those disorders which affect the peace and dignity of the state and the security of the citizen. The instrumentalities by which these objects are effected, however appointed, by whatever name called, are agencies of the state, and not of the municipalities for which they are appointed or elected. The whole machinery of civil and criminal justice, says a learned judge, has been so generally confided to local agencies, that it is not strange if it has sometimes been considered of local concern. But there is a clear distinction in principle between what concerns the state and that which does not concern more than one locality." Our conclusion is that the right of a city to the sole control of its police force has not been so reserved as to bring it within Const. art. 1, § 23, or *Id.* art. 4, § 10; that the act to establish a board of police commissioners for the city of Newport is not unconstitutional on the ground of interference with the right of that city to local self-government, so far as the appointment of a chief of police by said commissioners is

concerned; that the petition therefore states no ground for relief. The demurrer to the petition is sustained.

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**Power of Legislature to Assume Control of Municipal Police.**—The holding of the principal case on this subject is in harmony with the weight of authority; and none of the cases go so far as to hold that the legislature, in the absence of a constitutional restriction, cannot assume control of the police of a municipal corporation.

*Illinois.*—See People *v.* Chicago, 51 Ill. 17, which is in line with the principal case.

*Indiana.*—The provisions of the Indiana act of March 7, 1889, creating a board of metropolitan police and fire department, the members of which are appointed by the legislature, and in which is vested the control of the police and fire departments of cities subject to the act; the employment and control of the officers and employees thereof, the purchase of equipments and supplies, and the payment of bills, and to which is transferred all the property belonging to said departments in such cities, infringe upon the right of the citizens to local self-government, and the act is unconstitutional and invalid. City of Evansville *v.* State, 118 Ind. 426, 24 Am. & Eng. Corp. Cas. 204, 4 L. R. A. 93. In this case BURKSHIRE, J., in delivering the opinion of the court said: "If the act related alone to the management of the police department, and the state was proposing to take upon itself the burden of maintaining the department, as well as its management, or if it was made to appear that the city had failed to furnish a police force, or one that was sufficient for the protection of persons and property—then a very different question would be presented for our consideration. Except so far as an efficient police department goes, which is for the protection of the public at large, the people of the state are not interested in any of the matters to which the said act of the legislature relates, but the citizens of Evansville and Indianapolis, the two cities to which the act applies, are alone interested. It therefore becomes a question whether or not the legislature may take from the people of these two cities the right of local self-government—the right to control and manage their own purely local affairs in their own way, and place the management of all such local affairs under state control. We do not believe that the legislature has any such power. Before written constitutions the people possessed the power of local self-government. It is conceded that the people of Indiana originally possessed all governmental power, and it will not be questioned but

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what they still possess such of that power as has not been delegated. All the power which the people have delegated is what has passed from them by the constitution. Pom. Const. Law (9th ed.). See title "Central and Local Self-government," § 151 *et seq.*; 1 Dill. Mun. Corp. (3d ed.) § 9; Cooley, Const. Lim. (5th ed.) 225; People *v.* Hurlbut, 24 Mich. 44; People *v.* Detroit, 28 Mich. 228; People *v.* Chicago, 51 Ill. 17; People *v.* Lynch, 51 Cal. 15; People *v.* Alberston, 55 N. Y. 55; People *v.* Porter, 90 N. Y. 68."

See also, State *v.* Denny, 118 Ind. 449, 24 Am. & Eng. Corp. Cas. 223, 4 L. R. A. 65, where the court, in delivering its opinion, said: "In this case we do not deem it necessary to consider that portion of the law relating to peace-officers, or to determine the right of the general assembly to appoint officers of that character."

*Kansas.*—In State *v.* Hunter, 38 Kan. 578, in which a metropolitan police act giving the city council power to appoint a board of police commissioners was held constitutional, the court said in delivering its opinion: "Whatever may be said regarding the policy of placing the police administration of cities in a board of police commissioners who are chosen by state officers, rather than through the electors of the cities, there can be no doubt that the legislature has the power to do so.

*Kentucky.*—Under a constitutional provision that "officers of towns and cities shall be elected for such terms, and in such manner, and with such qualifications, as may be prescribed by law," the legislature may take the power of electing the police force of a city from the city authorities, and establish a board of police for the city and the county in which the city is situated, to be elected by the voters of the city and county, and to have the selection of the permanent police force of the city, which is to be paid from city taxes. Police Commissioners *v.* Louisville, 3 Bush (Ky.) 597.

*Louisiana.*—The Louisiana cases are in accord with the weight of authority on this subject. See Diamond *v.* Cain, 21 La. Ann. 309; Carrollton *v.* Board of Metropolitan Police, 21 La. Ann. 447.

*Maryland.*—In the absence of a constitutional restriction the legislature may disregard the charter powers of a municipal corporation relating to the appointment and control of the local police, and appoint a police board with authority to appoint and control the police of the municipality; and may place into the possession and management of such board the property of the municipality pertaining to its police department. Baltimore *v.* Board of Police, 15 Md. 376, 74 Am. Dec. 572.

*Massachusetts.*—In Commonwealth *v.* Plaisted, 148 Mass. 375, 23 Am. & Eng. Corp. Cas. 106, it was held that the legislature could take the control of the police of Boston from the city authorities and con-

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fer it upon a police board appointed by the governor. And it was said in the opinion: "We find no provision of the constitution with which it conflicts, and we cannot declare an act of the legislature invalid because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by any provision of the constitution."

"The several towns and cities are agencies of government, largely under the control of the legislature. The powers and duties of all the towns and cities, except so far as they are specifically provided for in the constitution, are created and defined by the legislature, and we have no doubt that it has the right, in its discretion, to change the powers and duties created by itself, and to vest such powers and duties in officers appointed by the governor, if, in its judgment, the public good requires this, instead of leaving such officers to be elected by the people or appointed by the municipal authorities. We are therefore of opinion that the legislature has the right to provide that the police of Boston shall be put under the control and management of a board of police appointed by the governor, and we see nothing in the details of the statute of 1885 which is open to any constitutional objection."

*Michigan.*—In People *v.* Mahaney, 13 Mich. 481, it was held that the principle forbidding taxation in the absence of representation did not prevent the legislature from enacting a valid law providing for the establishment of a police board for the city of Detroit and imposing upon the city the burden of raising by taxation the sum necessary to defray the expenses of the local police department, as estimated by such police board; as, in the language of the opinion, "they, (the people of the city) were represented in the legislature which passed the act and had the same proportionate voice there with the other municipalties of the state."

*Nebraska.*—The act of the legislature of 1897 (Laws 1897, chap 10, Comp. Stat. chap. 12 a), in so far as it assumes to confer author ity upon the governor to appoint fire and police commissioners in cities of the metropolitan class is void, as being an unlawful attempt to deprive the people of such cities of the right of local self-government. State *ex rel.* Smyth *v.* Moores, 55 Neb. 480, 41 L. R. A. 624. In this case the court per NOWAL, J., and RAGAN, C., in delivering its opinion, said: "The authorities quite uniformly agree that the preservation of the public peace is essentially a matter of public concern - that the instrumentalities by which the same is effected, whether appointed by the governor, or elected by a vote of the people, are agencies of the state, and not of the municipalities; and that there exists a well defined distinction between matters which concern the

municipality and those which pertain to the state at large. Conceding that the legislature unless inhibited by the Constitution, may provide the mode of selecting police officers, yet it has no power or authority to deprive the municipalities of the right to select officers whose duties are solely of a local nature, such as officers connected with the fire department. While the police control of cities in some of the states has been confided to boards of police commissioners appointed by some executive state officer or officers, yet the validity of such laws has been sustained solely on the ground that such officers are agencies of the state, and not of the municipalities for which they were appointed. State, Atwood, v. Hunter, 36 Kan. 578, and State, Atty. Gen., v. Covington, 29 Ohio St. 102, are distinguishable on the ground above stated, since the act under consideration in each case provided for the appointment of a board of police commissioners to be appointed by state authority, and no power was given such board concerning the management and control of the fire department. Gillespie v. Lincoln, 35 Neb. 34, 16 L. R. A. 349, is not an authority in favor of the proposition that the state has the power to choose the officers or members of the fire department of a city. It was decided in that case that a municipal corporation was not liable for the negligent act of members of its fire department.

"State, Simeral, v. Seavey, 22 Neb. 454, sustained a section of 'An Act Incorporating Metropolitan Cities, and Defining, Regulating, and Prescribing Their Duties, Powers, and Government,' approved March 30, 1887, which provided for a board of fire and police commissioners for cities governed by that act, and for their appointment by the governor. It was held that the mode designated for the selection of the members of the board did not contravene the constitution. That decision is diametrically opposed to the conclusion reached by the writer, and is the only one of its kind. It has been asserted, and probably not without foundation, that the section of the law there under consideration was adopted to give the party then in power in the state a supposed partisan advantage in the government of the affairs of the city of Omaha: and it may be that the same motive influenced the adoption of the provision of the law of 1887 under review. However that may be, it affords no ground for declaring a law unconstitutional. The sole question that concerns the court is whether the law is repugnant to any express or implied limitations upon the power of the legislature. The act before us, as well as the one construed in State, Simeral, v. Seavy, 22 Neb. 454, denied to the people of Omaha the power to choose a portion of their own local officers, and, in so far as it did so, is unconstitutional; for the right to provide and maintain a fire department in a city is one of the powers vested in the inhabitants of such municipality, as an[ele-

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ment of local self-government, and is to be exercised by them without legislative interference, except to the extent that the law-making body may create rules to assist in the exercise of such right."

*New York.*—In People *v.* Shepard, 36 N. Y. 285, in which it was held that the laws of 1865 and 1866, which created a Capital Police District from portions of certain counties, were constitutional, the court per PORTER, J., in delivering the opinion, said: "Most of the questions raised on the present appeal were disposed of ten years since, in the case of People, *ex rel.* Fernanda Wood, *v.* Metropolitan Police Commissioners, 15 N. Y. 532. They were discussed on that occasion with memorable ability, as well in the forensic arguments, as in the opinions delivered by the court; and the result was an exposition of the constitution in this regard, by which every citizen is bound.

Certain propositions are deducible from that decision, which essentially narrow the range of the present discussion.

1. It is within the constitutional authority of the legislature to establish new civil divisions of the state, embracing in the districts so created, several towns, cities or counties, or such portions thereof as may be deemed appropriate for the general purposes of civil administration.

2. The organization for police purposes of districts, not coterminous with others recognized by the constitution, is not inconsistent with the continuance of such antecedent civil divisions, for every general purpose prescribed in the organic law.

3. The police powers exercised in the towns, cities and counties, respectively, were vested in the local authorities by legislation, and not by irrevocable constitutional grant.

4. The legislature has authority to arrange the distribution of these powers as the public exigencies may require; apportioning them to local jurisdictions, to such extent as the law-making power deems appropriate, and committing the exercise of the residue to officers appointed as it may see fit to ordain.

5. This is a continuing legislative power, in virtue of which from time to time as occasion may require, jurisdiction committed to the towns, cities or counties, may be resumed and vested in other authorities appointed by the state government.

6. "The state," in the language of the distinguished jurist by whom in that case the leading opinion was delivered, "has an interest in the repression of disorder, and the maintenance of peace and security in every locality within its limits; and if from exceptional causes the public good requires that legislation, either permanent or temporary, be directed toward any particular locality, whether consisting of one county or several counties, it is within the discre-

tion of the legislature to apply such legislation, as in its judgment the exigency of the case may require; and it is the sole judge of the existence of such causes." 15 N. Y. 544; People *v.* Pinckney, 32 *Id.* 377."

But in People *v.* Albertson, 55 N. Y. 50, where the act "to establish the Rennselaer Police District was held repugnant to the section of the state constitution providing that municipal officers shall be elected by the electors of the municipality, or appointed by the anthorities thereof, it was said, in delivering the opinion: "It was sought to bring the case within the principles of People *v.* Draper, 15 N. Y. 532; but it comes far short of it in every important element, and is not within the reasoning of the very able judge who gave the prevailing opinion in that case, and of whom it is perhaps not too much to say that but for his ability and influence the decision might possibly have been the other way. That decision has now stood so long judicially uncondemned, although never I think satisfactory to the public or the legal profession, that it might not be proper under any circumstances to review or overrule it; and it is to be hoped, in the interests of constitutional government by the people, that the occasion to reaffirm its doctrines may never arise. To my mind the dissenting opinion of JUDGE BROWN, concurred in by JUDGE COMSTOCK, presents unanswerable arguments why the decision should have been different. The constitution, in providing for a state government in all its parts and for the entire territory, distributing its powers among the various departments and organizing and authorizing the creation and organization of local governments for the different parts of the state under the general division of counties, cities, villages and towns, and in such forms that every power of government necessary to be delegated to any locality may be delegated to and conferred upon one or other of the municipal governments thus authorized and recognized, would seem to exclude the idea of the creation of any new or other division for the exercise of political power, or any other or different local government, and by necessary implication prohibit it."

*Ohio.*—Under the general grant of legislative power conferred by the Ohio constitution, the general assembly may enact a valid statute creating a board of police commissioners for a city and conferring upon such board the power to appoint and control the policeman of the city, and the fact that prior to the adoption of such constitution the electors of the cities of the state had uniformly elected or appointed their own policemen is immaterial in this connection. State *v.* Covington, 29 Ohio St. 102.

*Virginia.*—In Burch *v.* Hardwicke, 30 Gratt. (Va.) 24, 32 Am. Rep. 640, it was held that the chief of police of a city is an officer of the

state, and not of the municipality in which he exercises his office; and that, though, under the constitution of the state, article 6, § 20, the mayor has authority to remove the officers of the municipality, the constitution does not invest him with the power to remove state officers, though they are elected by the people of the municipality or appointed by the municipal authorities, and are paid by them.

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## CITY OF HENDERSON

*v.*

## WINSTEAD.

(*Court of Appeals of Kentucky, Nov. 1, 1900.*)

**Streets—Change of Grade—Elements of Damage—Failure to Keep in Repair.***—In an action for injury to property by reason of lowering the grade of the street upon which it abuts, it is error to admit evidence to show that plaintiff was damaged by the city's failure to macadamize or gravel the street after the change of grade, as the city could be held liable only for special injury inflicted upon the property by the change of grade, and not for its failure to keep the street in repair.

**Same—Same—Measure of Damages.**†—In such an action, the measure of damages is the diminution in value of the property by reason of the lowering of the grade of the street.

APPEAL by defendant from Henderson county circuit court. *Reversed.*

*Clay & Clay*, for appellant.

*Yeaman & Yeaman*, for appellee.

HOBSON, J. Appellee, A. L. Winstead, is the owner of two vacant lots on First street in the city of Henderson, near the city limits. The city changed the grade of the street in front of his lots, cutting it down so that at the lowest point it was 4½ feet below the level of the ground, and at the highest point was on about the same level. He then filed

*See *notes*, 2 Mun. Corp. Cas. 556 *et seq.*

†See *note*, 3 Mun. Corp. Cas. 69

this suit to recover of the city damages for the injury to his property from the change of the grade of the street, alleging that thereby it had been damaged in the sum of $500. Issue was made as to the damages, and a verdict was rendered fixing the damages at $200. The chief questions on the appeal relate to the admission of evidence and the instructions of the court to the jury. As these raise, in effect, the same question of law, they will be considered together. The proof for appellee showed these facts: Before the street was cut down, it was on the natural surface of the ground, and had become hardened, leaving a good roadway to appellee's distillery, situated beyond on other property. Over it heavy loaded wagons could readily pass at all seasons of the year in front of the two lots in going to and from the distillery. On the side of the roadway there were a few trees and stumps, but there was no trouble in hauling over the roadway before it was cut down. After it was cut down, the city took no steps to rock or gravel or otherwise improve the street, and in wet weather and after freezes it became miry, and almost impassable. Coal wagons going with coal to the distillery mired in front of the lots, and had to be unloaded before they could be moved. The city objected to all this evidence. The objection was overruled, and the evidence comitted, but the court told the jury they were not to consider any evidence about the distillery. There was also evidence for appellee tending to show that his lots would have to be regraded, and to this extent were directly injured by the change of grade of the street. The evidence for the city tended to show that the roadway before the excavation was much like other dirt roads in winter or bad weather, and that from the slope of the lots they were not injured, but rather benefited, by the excavation. On this evidence the court, by instructions 1 and 2, in effect told the jury that, if the property had been injured by reason of the street being cut down or left in a bad condition for travel, or the ingress or egress to and from the street to the property had been impaired, they should find for appellee a fair compensation for the injury; and that in

estimating the damages they should not diminish the amount on account of any enhancement of the property in value by the change of the grade of the street, unless it received some special benefit not in common with other property along the line of the work. By instruction "A" they were also told substantially to find for appellee the amount the property was depreciated in value, if any, by the excavation of the street. On the whole evidence it is clear that the damage to the two vacant lots from the change of the grade is slight, and that the verdict of the jury is largely due to the fact that the city failed to macadamize or gravel the street after it was cut down. If, by cutting down the grade of the street, the city injured appellee's property, it is liable to him for the damage thus done. But, when the change of grade had been made, if the city failed to keep the street in repair, that was a distinct matter from the cutting down of the grade, and the liability of the city for this is just the same as for failing to keep in repair any other street in the city. According to the evidence, the street after it was cut down, was good in the summer or in dry weather, but became bad from the hauling done over it when wet, or soft after a freeze. This was due to the city's failure to keep its street in repair, or to have it graveled or macadamized. By section 3449, Ky. St., the city is empowered by ordinance to require the street to be thus improved at the cost of the owners of the ground fronting the improvement. In determining whether or not such a burden should be placed on the property owners, the city council necessarily exercises a large discretion. For the failure of its authorities to exercise duties of a discretionary nature the city is not responsible. Elliott, Roads & S. § 632. For failure to repair its street the city is civilly liable to any one using it who suffers special damage from its want of repair, but not to others. It was error, therefore, to admit the evidence as to the street being out of repair, or not graded or macadamized, and the recovery should have been limited to the damage to the two vacant lots from the cutting

Streets—Change of Grade—Elements of Damage—Failure to Keep in Repair.

down of the street. The measure of damages is the diminution in value of the property by reason of the lowering of the grade of the street. City of Louisville v. Hegan (Ky.), 49 S. W. 532. Instruction "A" given by the court expressed the rule properly, and instructions 1 and 2 should not have been given. Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

Same—Same—Measure of Damages.

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TAYLOR

*v.*

CITY OF MANKATO.

(*Supreme Court of Minnesota, Oct. 25, 1900.*)

**Sidewalks—Contributory Negligence—Using with Knowledge of Defect.***—One who, while traveling along a public thoroughfare in the suburbs of a city, on a dark night, with knowledge of a defect in the sidewalk, leaves the road, and takes the walk, and is injured by falling into the opening which he is trying to avoid, is not, as a matter of law, guilty of contributory negligence.

(Syllabus by the Court.)

APPEAL by defendant from Blue Earth county district court. *Affirmed.*

*C. O. Dailey*, for appellant.

*W. E. Young*, for respondent.

LEWIS, J. The plaintiff, a man 63 years of age, was walking along one of the main traveled thoroughfares entering the city of Mankato, on a dark night, at about 8 o'clock in the evening of April 1, 1899. At a given point beyond the Blue Earth river, in West Mankato, a plank sidewalk commenced upon one side of the street, and continued towards the main part of the city. The sidewalk consisted of pine

*See *notes*, 4 Mun. Corp. Cas. 648 *et seq.*

planks, about 6 feet long, laid across stringers, and, for more than a month prior to the date mentioned, had been in a defective condition, which defect was caused by the removal of one of the planks, leaving a hole about 6 feet long, 7 inches wide, and 10 inches deep. The street upon which plaintiff had been traveling was a well-graded roadway, but upon this occasion was wet and sloppy. There was no sidewalk on the opposite side of the street and no regular or even place for foot passengers. The plaintiff had known for a month, at least, of the defect in the sidewalk. On the night in question he had walked along the highway, from the country, a distance of about four miles, on his way to his home, a few blocks further on towards the city, and, coming to the sidewalk, he left the road, and took the walk, stepped into the hole, and was injured. This action was brought to recover damages for such injury, and the trial resulted in a verdict for plaintiff. From an order denying its motion for a new trial, defendant appeals.

The assignments of error present only one question for review, *viz.*: Was the plaintiff guilty of contributory negligence? It has been often held in this court, beginning with the case of Erd *v.* City of St. Paul, 22 Minn. 443, and ending with Lyons *v.* City of Red Wing, 76 Minn. 20, 78 N. W. 868, that previous knowledge that a public way is out of repair does not conclusively establish negligence on the part of a person attempting to traverse it; that the true test is, what would a man of ordinary prudence do under the circumstances? Appellant insists that, under the circumstances of this case, the plaintiff was bound to avoid the sidewalk entirely, and keep to the road, until he had passed the point of danger; that, having elected to leave a perfectly level way for a walk which he knew contained a hole into which he might step on account of the darkness, the plaintiff did that which the ordinary man, in the exercise of reasonable care and caution, would not do. The case mainly relied on in support of this contention is Wright *v.* City of St. Cloud, 54 Minn. 94, 54 N. W. 819. The facts in that case are essen-

tially different, and counsel has probably given undue weight to certain generalizing language in the opinion. There, the accident occurred in the daytime, and the plaintiff could and did see the dangerous condition of the path, made slippery and uneven by the melting and tramping of snow, which had not been removed for a long time. Such treacherous path continued over a considerable space, while the opposite side of the street was cleared from snow and easily accessible by crossing over. Under such conditions, it was properly held that the plaintiff was not in the exercise of reasonable care in attempting to walk along the uneven path. But in the case before us there was no path or sidewalk on the opposite side. The roadway was wet and sloppy, and was a frequently traveled thoroughfare. It was a dark night. The opening consisted of a space seven inches wide, over which one might easily step. The plaintiff, knowing that the plank was out, was mindful of the fact, was looking for the hole, thought he had passed it, and, after two or three steps more, stepped into it. The test to be applied is, what would a person of ordinary prudence have done under the circumstances? Would he have kept to the road in the wet, with a chance of meeting teams, or have taken the walk, and tried to avoid the hole? We think it was a question for the jury to determine. Order affirmed.

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TIESLER

*v.*

TOWN OF NORWICH.

(*Supreme Court of Errors of Connecticut, Oct. 4, 1900.*)

Personal Injuries—Defect in Sidewalk—Location of Carriage Blocks—Evidence of Usage to Disprove Negligence.—In an action against a town for personal injuries caused by an alleged defect consisting of a "carriage block" in the traveled way on a sidewalk, evidence of

Tiesler *v.* Town of Norwich

a general custom in the location of such objects in the town was not admissible to disprove the negligence imputed to defendant.

**Instructions.**—In such action, the pleadings and the evidence did not justify the defendant in claiming the charge as to notice which it framed.

**Sidewalks—Obstructions—Carriage Blocks.***—The duty to remove a carriage block from a sidewalk is modified by rights pertaining to adjoining proprietors and to the public in the use of the way. And every adjoining proprietor has a right of access to the traveled part of the highway, and, if separated from the driveway by a sidewalk, a right of access to his carriage across the walk, and, if convenient to enter his carriage at the driveway, the right of using a stepping stone or carriage block for that purpose, provided this can be done without unreasonably obstructing or endangering public travel; and a carriage block may be properly set up before a public place for the use of the general public. And a slight possible obstruction of a sidewalk by reason of the location of carriage block must be endured for the sake of the general convenience in using the way.

**Same—Same—Same.**—It was not the duty of the defendant town to remove the carriage block in question, unless its size, location, surroundings, etc., were such that, in view of the adjoining proprietor's rights, it unreasonably obstructed or endangered the public in the use of the walk, whereas if a stone of the same size had been on the walk without any reason or excuse, it might have been the duty of the town to cause its removal; and the charge given on this subject did not make this distinction clear.

APPEAL by defendant from New London county superior court. *Reversed.*

Case Stated.

The complaint alleged that the defect in the highway consisted in "a large block of stone, nearly two feet long, about one foot wide, and about ten inches high, then being in the traveled way on the sidewalk and street, and projecting about eight inches above the surface of the same." The answer denied the material allegations of the complaint. The finding of the court (THAYER, J.) sets forth the action of the court upon the trial substantially as follows: It was proved and admitted that the stone which caused the accident was a white marble carriage block, resting upon the sidewalk, within a few inches of the gutter, in

*See note at end of case.

front of a dwelling house, and was of the dimensions stated in the complaint; that there was a large tree standing in the sidewalk, in line with this stone, at each end of it, and distant therefrom at one end 4 feet, and at the other end 15 feet; that said sidewalk was on the south side of the street, there being no sidewalk on the north side; that the sidewalk at this point was smooth and level, and its width between the stone and the fence was 5 feet 4 inches; that all the travel on foot through the street was over this south sidewalk; and that it was a much-used walk. The plaintiff offered evidence tending to prove, and himself testified, that the accident occurred in the evening, when it was quite dark, and the ground and the block covered with snow; that he was on the north side of the street, carrying a basket of clothing, and crossed to the south side, where the carriage block was situated; that he stepped upon the block, slipped, stumbled, fell, and received the injuries complained of; that he was familiar with the place, and had known for many years of the stone being there, but did not see it at the time, or think of its being there. The plaintiff, without objection, offered witnesses to prove their opinion that the carriage block rendered the highway unsafe; and the defendant offered witnesses to prove the contrary opinion. The statute required the plaintiff to give the defendant a written notice of the accident, and description of the alleged defect in the highway, and injuries received, within 60 days after date of injury, and, in case the defect claimed was caused by ice and snow remaining on the walk, to give such notice within 15 days. The defendant gave no notice within 15 days, but gave notice within 60 days, describing the alleged defect as consisting in the carriage block. The defendant requested the court to charge as follows: "In regard to whether a carriage block set in its usual place on a highway renders the highway defective, as far as the duty of the town is concerned the law is that the town is not negligent by the fact of its allowing a carriage block of usual size and construction to be maintained at the customary place on a

sidewalk or street, provided the object do not project into the usual place of travel so as to be a hindrance to people traveling on the highway there, or a source of danger to persons passing along the usual line of travel, while in the exercise of due care." The court did not so charge, but on this point did charge as follows: "A carriage block is not necessarily an obstruction to the sidewalk. As a matter of law, you cannot say that it is an obstruction that renders the sidewalk or highway unsafe; nor, on the other hand, can you in all cases say that a carriage block of that kind, or a block of the description that is claimed here to have been proved by the plaintiff, is not an obstruction. It would depend upon the circumstances of the case. The circumstances— The stone, the amount of travel, its situation or location,—whether approximate or not to other objects. And all those circumstances are important to be considered in determining whether or not that block, resting there as it is admitted it was, constituted an obstruction to public travel, so that the highway was not reasonably safe for such travel under all the circumstances and facts in evidence before you, from which you can arrive at a conclusion on that point." The defendant further asked the court to charge that if the injury was due wholly or partly to a fall caused by the plaintiff slipping on the snow, and he did not give notice thereof to the town within 15 days, then he cannot recover. The court did not charge as requested, but on this point charged that, if the plaintiff's injuries were caused by a defect in the highway caused by snow or ice, he could not recover in this action, because he did not give the town notice of it. The defendant, to disprove the negligence imputed to it, asked one Spalding, its first selectman, the following question: "State whether or not there is in the town, outside of the city limits, a general usage of these objects at the edge of the sidewalk, which are known as 'carriage blocks.'" Upon objection by the plaintiff, the question was excluded. The defendant duly excepted. The appeal assigns as error (1) the rejection of the testimony of Spalding;

(2) the charge as to notice; (3) the charge as to the duty of a town in the removal of carriage blocks.

*Joseph T. Fanning*, for appellant.
*Donald G. Perkins*, for appellee.

Evidence—Usage—Admissibility.

HAMERSLEY, J. (after stating the facts). The question asked Mr. Spalding was properly excluded.

The pleadings and the state of testimony and claims, as shown by the finding, did not justify the defendant in claiming the charge as to notice which it framed; and it certainly has no occasion to complain of the charge as given.

Instructions.

The court was not required to charge as to the duty of a town in respect to the removal of carriage blocks in the words of the defendant's request; but we think the substance of the request on this point should have been clearly stated to the jury. The duty of a town to remove possible obstructions from a highway is modified by rights pertaining to adjoining proprietors and to the public in the use of the way. Every adjoining proprietor has a right of access to the traveled part of the highway. Hubbard *v.* Deming, 21 Conn. 356, 360. If separated from the driveway by a sidewalk, he has a right of access with his carriage across the walk; and, if convenient to enter his carriage at the driveway, he may use a stepping stone or carriage block for that purpose, provided this can be done without unreasonably obstructing or endangering public travel. So a carriage block may properly be set up before a public place for the use of the general public. Dubois *v.* City of Kingston, 102 N. Y. 219, 6 N. E. 273. A slight possible obstruction must be endured for the sake of the general convenience in using the way. Towns are not made insurers of safe travel, and their duty in providing a sufficiently safe highway is necessarily affected by the special rights of adjoining proprietors, as well as by beneficial results to the traveling public as a whole, and by the necessities of business. Beardsley *v.* City of Hartford, 50 Conn.

Sidewalks—Obstructions—Carriage Blocks.

Note

529, 542. In the present case it was not the duty of the town to remove the carriage block, unless its size, location, surroundings, etc., were such that, in view of the adjoining proprietor's rights, it unreasonably obstructed or endangered the public in the use of the walk, whereas if a stone of the same size were on the walk without any reason or excuse, it might be the duty of the town to cause its removal. The charge does not make this distinction clear. While it may be unobjectionable as far as it goes, it does not go far enough. Indeed, upon the admitted facts and testimony of the plaintiff, as they appear in the record, the trial judge might have been justified, while distinctly submitting all questions of fact to the jury, in expressing his own opinion that the weight of testimony showed that this carriage block did not unreasonably obstruct or endanger public travel. There is error in the judgment of the superior court. The judgment is reversed, and the cause remanded for further proceedings according to law. The other judges concurred.

Same—Same—Same.

NOTE.

**Streets and Sidewalks—Carriage Block as Obstruction.**—"It would be extending the rule of the liability of municipal corporations far greater than has yet been done in any decided case, to hold that they are liable for assenting to the placing of stepping-stones on the edge of sidewalks in front of hotels, stores, public buildings, and private residences. The courts have gone quite far in holding such corporations to a very strict responsibility in reference to accidents caused by a failure of their officers to keep the streets and sidewalks in a proper and safe condition; but it would be adding to the corporate liability beyond reasonable limits to hold that stepping-stones, which are almost a necessity in providing for the interest, comfort, and convenience of the public in the maintenance of walks, avenues, and streets, constitute a nuisance or obstruction; and that corporations are liable for damages by reason of accidents caused thereby." Dubois *v.* City of Kingston, 102 N. Y. 219, 12 Am. & Eng. Corp. Cas. 635, 55 Am. Rep. 804.

In Robert *v.* Powell, 52 N. Y. Supp. 918, it was held that no recovery could be had of an abutting owner for injury caused to a pedestrian by a carriage block placed on the curb of the sidewalk in the customary manner.

## CITY OF CINCINNATI

*v.*

## FLEISCHER.

(*Supreme Court of Ohio, Oct. 16, 1900.*)

**Streets—Defects—Carriage Blocks.***—The statute requires of municipalities the exercise of ordinary care in the construction and maintenance of streets and sidewalks; but that duty is not violated by permitting a carriage block of the usual size to occupy the usual position of such blocks, near the curb, and not upon that portion of the sidewalk which is designed for the use of pedestrians going upon, or passing along, the walk.

SPEAR, J., dissenting.

(Syllabus by the Court.)

ERROR by defendant to superior court of Cincinnati. *Reversed.*

In his lifetime George H. Bennett, the intestate of Fleischer, recovered a judgment against the city of Cincinnati on account of a personal injury which resulted to him from stumbling over a stepping stone or carriage block, located on a sidewalk of Race street, near the curb. The allegations of negligence in his petition are as follows: "Plaintiff says that the defendant is a city of the first grade of the first class, and is a municipal corporation, duly organized and existing under the laws of the state of Ohio. That heretofore, to wit, on the 19th day of January, 1898, the defendant wrongfully, willfully, knowningly, and negligently caused, suffered, and permitted a large stone block, about fourteen inches wide, and about nine inches high, and two and one-half feet long, to be and to remain upon the sidewalk of Race street, on the west side of said street, between Fifth and Sixth streets, in the said city of Cincinnati, and opposite No. 529 Race street,

*See Tiesler *v.* Town of Norwich (Conn.), *ante*, p. 682, and *note*.

about two feet from the curb of said sidewalk. That the said Race street was then and there for a long time prior thereto, and still is, a public street, which is much traveled and used by the citizens of the said city of Cincinnati, and by the public generally. That there was no guard, railing, lights, or signs around the said block of stone, and that the said block of stone had been permitted by the defendant to remain upon the said sidewalk, as stated, for a long space of time prior to the said 19th day of January, 1898, of all of which the defendant then and there had due and reasonable notice. That on said 19th day of January, 1898, about 6:20 p. m. of said date, when it was then and there dark, the plaintiff was then and there lawfully traveling on said street, walking south on the west side of the said Race street, and the plaintiff, without any default or negligence on his part, and not knowing that the said block of stone was then and there obstructing the said sidewalk, the plaintiff being then and there unable to see said block of stone by reason of darkness and rain, and of the number of the people carrying umbrellas raised, who were then and there using said sidewalk, then and there struck his left foot against the said stone on the said sidewalk, and then and there fell, and was then and there severely bruised," etc. The city admitted its corporate character, and that Race street was at the time of the plaintiff's alleged injury, and for a long time prior thereto had been, a public street, and it denied all other allegations of the petition. On the trial of the issues the city offered no evidence. The plaintiff introduced evidence tending to show that the carriage block was of stone, somewhat smaller than the usual size, and lying only far enough from the curb to permit the hubs and steps of carriages to pass. It was used for the convenience of persons getting into or alighting from carriages. It had occupied substantially the same position for more than 15 years. At the conclusion of the plaintiff's evidence counsel for the city requested the court to direct a verdict in its favor, which was refused. Other instructions

were requested and refused, but they are not material to the view which we take of the case. A verdict for the plaintiff having been returned, a motion for a new trial was overruled, and judgment was entered on the verdict. This judgment was affirmed by the superior court at general term.

*Ellis G. Kinkead*, *Wade H. Ellis*, *John V. Campbell*, and *H. K. Rodgers*, Corp. Counsel, for plaintiff in errror.

*Edmund T. Clayton*, *Thomas L. Michie*, and *Joel C. Clore*, for defendant in error.

SHAUCK, C. J. (after stating the facts.) The duty of municipalities with respect to streets and sidewalks is imposed by section 2640 of the Revised Statutes. It is to "cause them to be kept open and in repair, and free from nuisance." They are required to maintain such portions of them as are designed for the use of vehicles and pedestrians in a condition of reasonable safety for such use. They are not required to exercise such extraordinary care as will absolutely prevent the occurrence of accidents, nor to prohibit such usual erections in proper portions of the streets as public convenience requires. The block over which the plaintiff below fell, although upon the sidewalk, was not at a crossing nor upon any portion of the street designed for the use of passing pedestrians. It was within that portion of the street by the curb which, according to common knowledge, is devoted to carriage blocks, lamps, hitching posts, and shade trees, which pedestrians of ordinary care observe and avoid. There is no reason to question the correctness of the observation of SPEAR, J., in Elster *v.* City of Springfield, 49 Ohio St. 82, 96, 30 N. E. 274: "The laying of sewers like that of gas and water pipes beneath the soil, and the erection of lamps and hitching posts, etc., upon the surface, is a street use, sanctioned as such by their obvious purpose and long-continued usage." Any rule which would sustain a recovery in this case would require municipalities to remove all shade trees, and all such erections, whatever public inconvenience might result there-

from. In the well-considered case of Dubois *v.* City of Kingston, 102 N. Y. 219, 6 N. E. 273, where the facts shown, and the municipal duties involved, were, in substance, the same as those which are here presented, a recovery was denied. The allegations of the petition in this case permitted the presumption that the block was of the usual size, and that it occupied the position usually assigned to such blocks. The evidence offered by the plaintiff showed affirmatively that it was of such usual size, and that it occupied such usual position. Therefore the petition failed to state a cause of action, and the instruction requested should have been given. Judgment reversed.

SPEAR, J. (dissenting). The syllabus assumes that the block stood in the usual place on the sidewalk, and in a place where pedestrians were not accustomed to walk. Neither assumption is justified by the record. The stone stood 13 inches from the curb, instead of at the curb, and was on Race street, in Cincinnati, between Sixth street and Shillito place, a thickly-settled and much-frequented business street, where there were likely to be, at certain times of day, crowds of people. In my opinion, the law applicable to the facts was correctly given by the presiding judge, and the jury's verdict was fully warranted by the facts.

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CITY OF HENDERSON

*v.*

CLAYTON.

(*Court of Appeals of Kentucky, May 30, 1900.*)

**Pest Houses—Unlawful Location—Liability of City.***—Where a city is authorized by law to establish a pest house, the acts of its officers in establishing it are the acts of the city, and the latter is responsible to a person injured by the unlawful location of the pest house.

**Same—Same—Action against City upon Statute Giving Remedy against Officers Only.**—Although a statute imposing a duty upon a

*See Frazer *v.* City of Chicago (Ill.), 4 Mun. Corp. Cas. 509.

city as to the location of a pest house, provides a remedy for the violation of such duty only against the city officers, a person injured by such violation may maintain an action for its violation against the city.

Instructions—Amendments—Harmless Error.—While an amendment to an instruction should not ordinarily be made after the argument of counsel, it is harmless error to do so, where the amendment only states what was impliedly expressed in a previous instruction.

APPEAL by defendant from Henderson county circuit court. *Affirmed.*

*John L. Dorsey*, *W. P. McClain*, *John F. Lockett*, *John W. Lockett*, and *Clay & Clay*, for appellant.

*S. B. & R. D. Vance* and *Montgomery Merritt*, for appellee.

HOBSON, J. Appellee filed suit to recover damages for the location of its pest house within one mile of the corporate limits of the city of Henderson, by reason of which she and her family took the smallpox. She sought to recover against the city and the municipal officers jointly. This is the second appeal of the case. The opinion on the former appeal will be found in Clayton *v.* City of Henderson, 44 S. W. 667. On that appeal it was held that she could not sue the city and its officers jointly, and on return of the case she elected to prosecute the action against the city alone. After this a trial was had, resulting in a verdict and judgment against the city for $2,775. From this judgment the city prosecutes the appeal now before us. Section 3909, Ky. St., is as follows: "It shall not be lawful to locate or maintain any pest house or other place intended for the treatment of eruptive diseases, or diseases which are contagious or infectious, within the corporate limits of any incorporated city or town, or within a distance of one mile of the boundary line thereof. Any officer of any city or town, or other person, who shall violate the provisions of this act, or in any wise aid or abet therein, shall be deemed guilty of a misdemeanor, and upon conviction thereof in

Case Stated.

any court of competent jurisdiction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and be liable in damages to any person injured thereby, and if willfully done, such person or his heirs or representatives may recover punitive damages." As the city was authorized by law to establish and maintain a pest house, the acts of its officers in establishing and maintaining the pest house in question were its acts, and it is responsible to the party aggrieved, as well as its agent through whose instrumentality it acted. This was expressly determined on the former appeal.

Pest Houses—Unlawful Location—Liability of City.

It will be observed that, while the statute imposes a duty upon the city, it provides a remedy by action only against the city officers in behalf of the person injured. While this court on the former appeal said that a common-law cause of action was stated against the city, it was not meant that the petition stated only a common-law cause of action independent of the statute. We think the averments sufficient to constitute a cause of action independent of the statute, and also a cause of action, which, according to the common law, arises from the violation of a statute enacted for the protection of the citizen. From time immemorial, where a statutory duty for the protection of individuals had been violated, an action at common law might be maintained. The common-law rule referred to is thus stated in Com. Dig. tit. "Action upon Statutes": "In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." Another common-law authority thus states the rule: "Whenever an act of parliament doth prohibit anything, the party grieved shall have an action, and the offender shall be punished at the king's suit. It is written in the hornbook of the law that the public and a party particularly aggrieved may each have a distinct but concurrent remedy for an act which happens to be both a public

Same—Same—Action against City upon Statute Giving Remedy against Officers Only.

and a private wrong." End. Interp. St. § 463. The same common-law rule is laid down in Bish. Noncont. Law, § 133, and in Cooley, Torts, p. 658. It is also recognized in section 466, Ky. St.: "A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed." While the statute involved here imposes on the municipal officers a criminal responsibility, and also makes them liable civilly to the party aggrieved for the injury or for punitive damages, if it is willfully done, it is silent as to a remedy against the municipality, and, nothing being provided as to the remedy against it for its doing what the statute makes unlawful, the common-law rule applies; for the wrong is the act of the city whose orders the municipal officers execute, and as the remedy against the officers might in many cases, from insolvency and the like, be wholly inadequate, this provision of the statute, nothing to the contrary appearing, must be regarded as merely cumulative. The city of Henderson was therefore liable to appellee for such damages as she sustained by reason of the city's violation of section 3909, Ky. St., above quoted, although that statute did not in terms impose this liability on it, and the court below properly so instructed the jury.

There was no error in the admission or rejection of evidence to the prejudice of the city. The instructions fairly presented the law of the case. The addition that was made to the second instruction only stated what was impliedly expressed in the first instruction, and, while amendments to instructions should not ordinarily be made after the argument of counsel, a correction like this during the argument is not ground for reversal. While the verdict is large, it is not so large as to justify us in setting it aside, considering the loathsomeness of the disease, and the anxiety and suffering it must have entailed upon appellee. Judgment affirmed.

Instructions—Amendments—Harmless Error.

MURRAY

*v.*

VILLAGE OF GRASS LAKE.

(*Supreme Court of Michigan, Oct. 31, 1900.*)

**Liability of Municipality for Acts Done on Recommendation of Board of Health.***—A municipal corporation is not liable for the flooding of land caused by the raising of the level of a lake, where the change in such level was authorized by the common council acting on the recommendation of a board of health appointed by the council in accordance with the general statute to which the municipality owed its existence, and which also conferred upon the council all the authority of a board of health.

ERROR by plaintiff to Jackson county circuit court. *Affirmed.*

*John W. Miner* (*Grove H. Wolcott*, of counsel), for appellant.

*Thomas E. Barkworth*, for appellee.

MONTGOMERY, C. J. This case was determined below on demurrer to the plaintiff's declaration. Final judgment was entered for the defendant, and plaintiff brings error. Briefly stated, the averments of the declaration are: That the plaintiff owns certain land adjoining Tims Lake, which is connected with the outlet of Grass Lake. Grass Lake adjoins the village of that name, and its outlet is within the corporate limits. That for more than 20 years the waters of Grass Lake have been maintained at a certain level. That on the 3d of May, 1897, the board of health of defendant village recommended that the water of Grass Lake be raised to its former level, and the common council, by resolution, and without any necessity therefor, ordered that the lake be raised to its former height by raising the outlet, which had

*See *note*, 1 Mun. Corp. Cas. 41.

theretofore been lowered. That in pursuance of such resolution defendant caused the outlet to be obstructed so that the water of the lake was raised two feet higher than the level which had been maintained for 20 years. That the land of plaintiff, which had during this 20 years been suitable for pasture and meadow, became flooded, and of no value or use to plaintiff.

The demurrer rests upon two substantial grounds: First, it is alleged that the declaration shows upon its face that the act complained of was *ultra vires*; and, second, that, if any power existed in the village to perform the act complained of, it was an act done in excess of governmental function, and the duty attempted to be performed was not a corporate duty, but was exercised as a governmental agency, and that for any improper exercise of such a function no right of action accrues to an individual against the corporation. The record does not show upon which ground the demurrer was sustained. In Dill. Mun. Corp. § 966, the rule is stated as follows: "As respects municipal corporations proper, whether specially chartered or voluntarily organized under general acts, * * * it is, we think, universally considered, even in the absence of a statute giving the action, that they are liable for acts of misfeasance positively injurious to individuals, done by their authorized agents or officers in the course of their perform ance of the corporate powers constitutionally conferred, or in the execution of corporate duties." This rule has been recognized in this state. Sheldon *v.* Village of Kalamazoo, 24 Mich. 383; Ashley *v.* City of Port Huron, 35 Mich. 296; Seaman *v.* City of Marshall, 116 Mich. 327, 74 N. W. 484; Morley *v.* Village of Buchanan, 82 N. W. 802. As corollary to the rule above stated is the rule laid down by the same learned author (section 968): "If the act complained of lies wholly outside the special powers of the corporation as conferred by its charter or statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act, or whether it be

done by its officers without its express command; for a corporation cannot, of course, be impliedly liable to a greater extent than it could make itself by express corporate vote." The difficulty arises in drawing an exact line between acts which are not *ultra vires* in this sense and those which are. As we understand the plaintiff's contention, it is substantially that, where a corporation is given general power to act with a certain purpose, or to effect certain objects, it may become liable for acts of misfeasance directed by the governing body, even though the act in question is committed while employing means which the corporation is not, under any circumstances, authorized to employ. If this contention has support in our own cases, it is found in Sheldon *v.* Village of Kalamazoo, *supra*. The contention of defendants, on the other hand, is that, when the act of misfeasance is one which the municipality has no authority to do under any circumstances, it is so far *ultra vires* as that the governing body of the corporation cannot make the corporation liable as for a tort by an unauthorized invasion of property rights, particularly when no benefit accrues to the corporation by the unauthorized act. Defendants' contention certainly has the support of eminent authority. Anthony *v.* Inhabitants of Town of Adams, 1 Metc. (Mass.) 284; Cavanagh *v.* City of Boston, 139 Mass. 426, 1 N. E. 834; Mayor, etc., *v.* Cunliff, 2 N. Y. 165. The difficulty in formulating a general rule on this subject has been recognized by two eminent writers. Dill. Mun. Corp. § 969; Tied. Mun. Corp. § 324. We do not find it necessary to lay down any precise rule in this case, as we prefer to rest our conclusion on other grounds. The act under which defendant village was incorporated provided by section 2821 that "the council shall have and exercise all the powers and authority conferred upon boards of health by the general laws of the state, so far as the same may be applicable, and they may enact such ordinances as may be necessary for regulating the proceedings, and mode of exercising such powers." The next section authorizes the council to appoint a board of health. It

would appear that that was done in this case. It also appears that the action taken by the council was taken on the recommendation of the board of health. The action of the council was doubtless taken under authority of the section quoted. The fact that the wrong was committed by the officers of the village does not fix the responsibility upon the municipality if the wrongful act was done under authority of a general statute in the attempt to perform a public service not distinctively local or corporate. Dill. Mun. Corp. § 974. It is apparently the established rule that local health officers acting under a general statute of the state conferring their powers are not performing corporate functions, but are representatives of the state, and that the municipality is not liable for the acts of such boards, either of misfeasance or nonfeasance. Tied. Mun. Corp. § 332; Dill. Mun. Corp. § 977; 4 Am. & Eng. Enc. Law (2d Ed.) p. 607; Bryant *v.* City of St. Paul, 33 Minn. 289, 23 N. W. 220; Rudolphe *v.* City of New Orleans, 11 La. Ann. 242; Mitchell *v.* City of Rockland, 41 Me. 363; Gilboy *v.* City of Detroit, 115 Mich. 121, 73 N. W. 128; Webb *v.* Board, 116 Mich. 516, 74 N. W. 734. This view is decisive of the case, and the judgment will be affirmed. The other justices concurred.

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GAMEWELL FIRE-ALARM TEL. CO.

*v.*

CITY OF LAPORTE.

(*Circuit Court of Appeals, Seventh Circuit, June 5, 1900.*)

**Limitation of Indebtedness—Void Contract—Right to Equitable Relief.**—The contract provided for a fire-alarm plant to be owned and operated by the defendant city, and was invalid merely because it purported to create a debt when the existing indebtedness of the city was beyond the amount limited by the state constitution. To save the contractor who furnished work and materials under such contract from sacrifice of his contribution in whole or in part, a

Gamewell Fire-Alarm Tel. Co. *v.* City of Laporte

decree was sought to create and enforce a contract between the parties departing radically from that which was intended and entered into; placing the plant and its control in private hands, together with a perpetual franchise to so maintain and operate the plant. *Held*, that the bill seeking for such decree was properly dismissed for want of equity.

APPEAL by complainant from the circuit court of the United States for the district of Indiana. *Affirmed.*

The appeal is from a decree, entered on demurrer, which dismissed the bill of complaint, as amended, for want of equity. 96 Fed. 664. The bill alleges substantially the following facts as the grounds for equitable relief: The complainant is a New York corporation, and engaged in the business of making and installing "fire-alarm and police telegraph systems," and on July 16, 1890, made proposal, in writing, to furnish to the city of Laporte, for the sum of $3,500, its "system of automatic fire-alarm telegraph," according to specifications stated in the proposal, to be completed and ready for operation within four months. The apparatus, material, and work to be supplied by the complainant included a "tower bell striker," but not the bell, and all the new poles "necessary to complete the line circuit." Payment of the contract price was to be made by the city on May 1, 1891, and on receipt thereof the proposal states that "unrestricted license to use and perpetuate the apparatus" is thereby conveyed to the city. It further provides that the city shall furnish a suitable room for the station, and "shall secure the right of way through the public highways for the wire circuit, give the use of all poles now standing that may be owned or controlled by said city, and the use of such bell as may be selected for giving alarms." This proposal was accepted on behalf of the city after an opinion was given, in writing, by the city attorney to the effect, among other matters, that objections "that the city cannot incur a debt, as they now owe more than the constitutional limit," are not sufficient to defeat the wish of the common council, because there existed in the general fund an unappropriated balance which could

be employed for the payment contemplated by the contract, and, if no funds were applicable, warrants could be drawn, payable when the tax of the current year was collected. "Relying upon said contract, and said opinion as to its legality," the complainant furnished and installed the system accordingly, which was accepted by the city on December 19, 1890; and the system thus installed "is complete and entire, and incapable of dismemberment or disintegration without destroying the use thereof, and without irreparable injury to the several parts composing the same." When the time for payment matured, the city refused to pay the contract price; and the complainant brought suit in the state court for its recovery, which resulted in a decision by the supreme court of the state (City of Laporte *v.* Gamewell Fire-Alarm Tel. Co., 164 Ind. 466, 45 N. E. 588, 35 L. R. A. 686), that the contract was void by reason of the indebtedness of the city beyond the constitutional limit, and judgment was rendered against the complainant accordingly. The system so constructed is "of great utility and even of prime necessity" to the city, and, being in the possession of the complainant after completion, was turned over to the city in the faith and belief that the contract was obligatory on the city and payment would be made; and after such decision the city was permitted to retain possession pending negotiations for an adjustment, and "solely for the public use and safety," and "not with intent to waive or part with any interest or right therein." The indebtedness of the city has since become reduced to such extent that it may lawfully become obligated "to buy said plant and system," and many fair proposals were made to the defendant to that end, but were all rejected; and finally, about February 28, 1898, the complainant became convinced that it was necessary, "in justice to itself, to acquire possession of and to operate said plant, through and by its own officers, agents, and employees," and thereupon, "with such objects in view, * * * demanded possession of said plant from said city." The city refused compliance, and has since wrongfully withheld the plant from complainant,

and continued the use thereof; and, although such use is reasonably worth $600 per annum, the city has refused to pay reasonable compensation therefor, after deducting its proper expense and outlay. The complainant "tenders and holds itself ready and willing to perform and discharge all public duties" incident to said system, and avers that it is without adequate remedy at law. The prayers for relief are, in substance: (1) That the defendant be enjoined *pendente lite* from use of the system in any manner unless fair compensation is paid, jurisdiction over the plant to be retained by the court to enforce such payment; (2) that an accounting be had for past use; (3) that the defendant be adjudged as holding the system and all easements and franchises as trustee for the use and benefit of the complainant, subject only to considerations of public safety and convenience; (4) that, in default of satisfactory arrangement between the parties, the defendant be required to make over to the complainant's possession the system, with all easements and franchises, as an entirety; (5) that the defendant be thereafter perpetually enjoined from interference with the management, operation, or disposition of the plant.

*James B. Curtis*, for appellant.

*James S. Harlan*, for appellee.

Before WOODS and GROSSCUP, Circuit Judges and SEAMAN, District Judge.

SEAMAN, District Judge, after making the foregoing statement, delivered the opinion of the court.

The appellant, who was the complainant below, contracted to furnish a fire-alarm system or plant, to be owned and operated by the city of Laporte, at a purchase price to be paid by the city in the following year after completion and acceptance; and this in the face of the fact, then known to all parties, that the existing indebtedness of the municipality was beyond the amount limited by the constitution of the

state, and that it was thereby prohibited from incurring further indebtedness. The plant, having been installed in conformity with the contract, was accepted, and went into the possession and use of the city, but payment was refused; and thereupon the appellant sued in a state court to recover the purchase price, resulting in a final adjudication dismissing the action on the ground that the contract violated the constitutional provision referred to, and was invalid. City of Laporte *v.* Gamewell Fire-Alarm Tel. Co., 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686. On such state of facts, equitable relief is sought through the present bill, which is predicated on the conclusiveness of that adjudication to bar recovery upon the contract; and it is conceded in the argument for support of the bill, as clearly held in the kindred case of Litchfield *v.* Ballou, 114 U. S. 190, 193, 5 Sup. Ct. 820, 29 L. Ed. 132, that the invalidity is equally effectual against any implied promise to pay for the reasonable value of the property so furnished. The question is not presented of right on the part of the appellant to recover and remove any severable material or appliances furnished by it under the contract, and so appropriated by the city, for the reason that relief of that character is inadmissible, if not impossible, under the allegations of the bill, even if otherwise the subject of equitable remedy. It is expressly alleged that the plant, which includes portions contributed by the city, constitutes an entirety, and is "incapable of dismemberment or disintegration without destroying the use thereof, and without irreparable injury to the several parts composing the same," and, in effect, that the only available remedies in favor of the appellant are (1) an accounting in reference to the past use, to ascertain just compensation therefor; (2) an arrangement between the parties for future compensation in an annual rental for the use; or, in default of such arrangement, (3) the plant to be turned over as an entirety, "complete and ready for operation," to the appellant, as owner, for management and use, together with a perpetual franchise for that purpose, to be implied from the contract.

The bill rests on the theory that the contract is so far severable that laying aside the void promise of the city to pay for the plant, as purchaser, there remains the permission which was granted by the city for its construction, together with the fact of the actual operation of the plant by the contractor for a brief period before it was delivered over, and that out of these circumstances equity may imply a grant by the city of a franchise to the contractor to operate and manage the system as the beneficial owner, and will enforce both ownership and franchise in his favor whenever the contract of purchase becomes inoperative. How the intended public nature of the system, described as one "of great utility and even of prime necessity to the city," can thus be preserved, is neither disclosed nor intimated. In other words, the appellant invokes equitable relief, not only to set aside the contract, which was deliberately made between the parties, but to substitute a new contract, and to establish relations with the municipality not contemplated in the original transaction. The contract provided for a plant to be owned and operated by the city, for municipal purposes, clearly within its power; and the invalidity arose out of the creation of a debt to accomplish the purpose, and not in the purpose for which it was made. To save the contractor who furnished work and materials under this contract from sacrifice of his contribution in whole or in part, a decree is demanded to create and enforce a contract between the parties departing radically from that which was intended and entered into; placing the plant and its control in private hands, together with a perpetual franchise to so maintain and operate the system. The terms of the contract as made afford no semblance of support for the contention that the grant of a franchise to that end may be inferred, and, aside from the consideration of the inviolable nature of municipal powers in that regard, the doctrine is well established that no measure of relief which would so change the contract purposes and relations can be granted by a court of equity, even in the absence of all remedy at law. Magniac *v.* Thomson, 15

How. 281, 299, 14 L. Ed. 696; Hedges *v.* Dixon Co., 150 U. S. 182, 192, 14 Sup. Ct. 71, 37 L. Ed. 1044. As stated in Magniac *v.* Thomson:

"Whenever the rights or the situation of the parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim, '*Æquitas sequitur legem*,' is strictly applicable."

The case presented by the bill is within the rule held in Litchfield *v.* Ballou, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132, where the conditions were analogous in many respects. Bonds were there issued by the municipality, beyond the constitutional limit, for the construction of waterworks, and were finally held invalid for that reason. The bondholders then proceeded in equity to obtain satisfaction of the bonds through a sale of the waterworks plant, but their claim of an equitable lien for that purpose was declared untenable, and the bill was dismissed. So in the case at bar the decree properly dismisses the bill for want of equity, without prejudice to proceedings at law, and it is accordingly affirmed.

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NEGLEY, SHERIFF,

*v.*

CITY OF HENDERSON.

(*Court of Appeals of Kentucky, Nov. 21, 1900.*)

**Municipal Corporations—Taxation—Waterworks Property.***—A municipal corporation engaged in the business of operating waterworks, and charging its citizens for water supplied thereby, is subject to taxation on account of the tangible waterworks property, to the same extent as a private corporation would be under the same circumstances.

*See Negley *v.* City of Henderson (Ky.), 3 Mun. Corp. Cas. 539, and *foot-note*.

Negley, Sheriff, *v.* City of Henderson

**Same—Same—Same—Suit to Enjoin Collection of Tax—Pleading.**—In an action by a city to enjoin the collection of a tax on its waterworks property, an averment that the valuation of such property was excessive was insufficient, as it was not accompanied by an allegation that an application had been made to the board of valuation and assessment for relief.

APPEAL by defendant from Henderson county circuit court. *Reversed.*

*Montgomery Merritt*, for appellant.

*Clay & Clay*, for appellee.

DU RELLE, J. The city of Henderson instituted three suits against the sheriff of the county to enjoin him from collecting taxes on certain tangible property of the city, including the waterworks, for the years 1894 to 1897, inclusive. A demurrer was interposed to the petitions and overruled, and judgment entered granting a perpetual injunction against the collection by the sheriff of those taxes. Subsequently the city instituted another suit, to enjoin the collection of the tax for the years 1896 and 1897, assessed upon the franchise of the Henderson Waterworks Company, alleging in substance that, while the legislature had incorporated the Henderson Waterworks Company, the city was authorized to, and did, build the waterworks, and issued its bonds therefor, and had ever since been the exclusive owner of the waterworks in its municipal capacity; that the waterworks were used to supply the city and its inhabitants with water; that the inhabitants of the city, or consumers of water, were charged a very low rate therefor, and were required to pay an *ad valorem* tax, for the purpose of keeping down the interest on the bonds issued by the city for the purpose of building the works; and that the balance, after payment of running expenses and current interest, was covered into the city treasury and used exclusively for public purposes. By amended petition it was averred that all over the city were waterplugs and fire hydrants, through which water was furnished the

Case Stated.

fire department of the city, free of charge, for the extinguishment of fires; that by the waterworks water was furnished to the public parks for drinking purposes, and for the fountains and lakes therein, and for flushing and cleaning ditches, culverts, sewers, gutters, and streets, as well as for public drinking fountains and water troughs, which use was conducive and necessary to the safety, health, comfort, and convenience of the public, and the preservation of public and private property, and the waterworks franchise was therefore not subject to taxation. A demurrer to this petition was overruled, and a judgment entered granting a perpetual injunction, from which judgment this appeal has been prosecuted.

The records of the first three cases mentioned, which were in the same court, were referred to in the petition as a part thereof, and have been copied entire into the record in this case, as was undoubtedly proper; the judgments therein being pleaded as *res judicata* against the taxes, the collection of which is sought to be enjoined in this action. But in the statement filed on this appeal the judgments in those three cases are stated as appealed from. This seems to us to be an attempt to appeal not only from the judgment in this record, but from the judgments in the exhibits. We are not aware of any practice which justifies this course, and shall not consider the appeals from the exhibits.

The question whether the petition presents grounds for exempting the Henderson waterworks from taxation under section 170 of the constitution seems to us to have been settled, since the adoption of the present constitution, in City of Covington *v.* Commonwealth (Ky.), 39 S. W. 836 (opinion by CHIEF JUSTICE LEWIS), in which waterworks property of a city was said to have "been invariably treated by this court as belonging to the latter class [property adapted and used for profit or convenience of the citizens, individually or collectively], and consequently subject to state and county taxation." This case is followed and approved in the case of Commonwealth

Municipal Corporations—Taxation—Waterworks Property.

*v.* City of Louisville (Ky.), 47 S. W. 865, in an opinion by JUDGE PAYNTER, in which it is held that "a municipality may have two characters of property, one governmental or public, the other private or proprietary," and that the wharf property of the city of Louisville belongs to the latter class. In the case of City of Newport *v.* Commonwealth (Ky.), 50 S. W. 845, 45 L. R. A. 518, it was held "to be well settled that the tangible property used for waterworks is subject to taxation, and that the municipality, as to it, occupies the position of, and is to be treated as, a private corporation," and, further, that "as to that property it is subject to a franchise tax, and must make report therefor as required in section 4078, Ky. St.," inasmuch as it makes a charge against its people for water, and is therefore engaged in the business of operating waterworks.

The averment that the valuation of the waterworks was excessive is insufficient. There is no allegation that application was made to the board of valuation and assessment for relief. See Royal Wheel Co. *v.* Taylor County (Ky.), 47 S. W. 876.

Same—Same—Same—Suit to Enjoin Collection of Tax—Pleading.

This brings us to consider the question of *res judicata*. It was, in City of Newport *v.* Commonwealth, *supra*, distinctly and emphatically held that an adjudication as to the tax of one year did not create the estoppel of *res judicata* against the same tax for another year. It seems to us equally clear that it does not create an estoppel against the collection of a different tax upon different property for the same year. If the one proposition be true, the other must be true, also. For the reasons given, the judgment is reversed and the cause remanded, with directions to set aside the judgment and sustain the demurrer to the petition, and for further proceedings consistent herewith.

WHITTAKER

*v.*

CITY OF DEADWOOD *et al.*

(*Supreme Court of South Dakota, March 2, 1900.*)

**Local Assessments—Payment under Protest.**—The payment of local assessments under protest, after an appeal from a decision of the circuit court sustaining their validity, is no ground for the dismissal of the appeal.

**Same—Same.***—Money paid on account of local assessments, under protest, in order to prevent the conveyance of the property by tax deed, may be recovered.

**Streets—Change of Grade—Damages—Constitutional Provisions.**†—The provisions of section 13, art. 6, of the constitution of South Dakota, declaring that private property shall not be taken for public use or damaged unless compensation be first ascertained and paid, are not controlled by section 18, art. 16, c. 37 of the state laws of 1890, and such provisions apply not only to a change of street grade legally established, but also where a grade is for the first time legally established.

**Same—Same—Same.**—Under such constitutional provisions, a city, before proceeding to grade and macadamize its streets in accordance with a newly established grade, must take proper proceedings to ascertain the damages which property holders along the streets might sustain by reason of the new grade; and a failure to do this will prevent the city from legally imposing any part of the cost of the improvement upon a property owner whose buildings were erected with reference to the grade existing at the time of their erection.

**Local Assessments—Sale of Delinquent's Property—Compliance with Statutory Requirements.**‡—When the statute under which property is to be sold for failure to pay a local assessment prescribes the time for holding the sale, a failure to comply with such requirement will prevent the sale from being legal.

**Same—Validity—Establishment of Street Grade after Making Contract—Notice to Property Owner.**—The fact that a street grade

*See *notes*, 2 Mun. Corp. Cas. 249.

†See *note*, 2 Mun. Corp. Cas. 559.

‡See *note*, 1 Mun. Corp. Cas. 560.

was established subsequent to the adoption of the resolution declaring the necessity for improvements, and the ordinance providing therefor and the contracts made thereunder, if in establishing such grade there was a material change in the grade as it formerly existed, renders invalid local assessments for the improvement, as the property owners were entitled to notice of the change in order to have an opportunity to protest.

APPEAL by plaintiff from Lawrence county circuit court. *Reversed.*

*Chas. E. Davis* and *G. C. Moody*, for appellant.

*W. G. Rice* and *John R. Wilson*, for respondents.

CORSON, J. This is an action on the part of the plaintiff to have declared illegal and void certain special assessments for street improvements, to cancel certain tax certificates which have been issued therefor, and to enjoin the city from issuing a deed or deeds upon such certificates. Findings and judgment were in favor of the defendant. Since the taking of the appeal in this case the plaintiff has redeemed the property from the sale, and the respondent now moves the court for that reason to dismiss the appeal. It appears from the affidavits read on the hearing of the motion to dismiss the appeal that the time for taking out the deed or deeds upon the street-assessment certificates was about to expire, and that the day prior to the expiration of such time the plaintiff paid to the city treasurer the amounts represented by the certificates, with interest thereon, under protest, and that the city treasurer thereupon canceled said certificates. The respondent insists that, the certificates being canceled, there is no longer any controversy existing between the plaintiff and the defendant. But we are of the opinion that, as the redemption of the certificates was made in order to prevent them from ripening into a deed to the property, and under protest, the appellant is entitled to have the case decided in this court upon its merits. Not only is there a question of costs involved in the case, but also the right of the plaintiff to have a determination of the questions involved in the action, in

Local Assessments—Payment under Protest.

order that the judgment of the court below may be reversed, and cease to be a bar to future proceedings to recover back the money so paid under protest. It is claimed by appellant that the payment of the amounts due upon the tax certificates was a voluntary payment, but we cannot accede to this view. Where a party redeems property about to be conveyed by a tax deed, under protest, such payment cannot be regarded as voluntary. Under the theory of the respondent in this case, the appellant was compelled to do one of two things,—either allow the tax certificates to ripen into a deed, which might result in depriving him of his property, or lose his right of appeal in this court. We are not inclined to sanction such a doctrine. Hanaw *v.* Bailey (Mich.), 46 N. W. 1039, 9 L. R. A. 801; Martin *v.* W. J. Johnston Co., 128 N. Y. 605, 27 N. E. 1017; Harrington *v.* Town of Plainview (Minn.), 6 N. W. 777; James *v.* Wilder, 25 Minn. 305; Peyser *v.* Mayor, etc., 70 N. Y. 497; Bank *v.* Mayor, etc., 43 N. Y. 184; Swift *v.* City of Poughkeepsie, 37 N. Y. 511. This brings us to the merits.

Same—Same.

It appears from the case before us that the plaintiff was the owner of certain lots on the corner of Sherman and Deadwood streets, in the city of Deadwood. Prior to 1893 he had erected buildings upon the said lots, which were occupied for store and office purposes. At the time his buildings were erected, they conformed to the grade of Sherman and Deadwood streets as it then existed. On the 5th of June, 1893, the city council of that city adopted a resolution declaring that they deemed it necessary to grade, macadamize, curb, drain, and otherwise improve, among others, Deadwood and Sherman streets. Within 20 days from the passage of this resolution the plaintiff filed his protest against grading and macadamizing the said streets; stating therein that he had made improvements upon his property abutting upon said streets, and that he was advised that in grading and macadamizing said streets it was proposed to change the grade, which said change would leave his improvements below the grade so to be established, and that

such change of grade could not lawfully be made without making compensation to him for the damage which would result to his property. Notwithstanding this protest on the part of the appellant, and without taking any proceedings to ascertain the amount of damages which the appellant might sustain by reason of a change of grade, the city council on the 28th day of August, 1893, passed an ordinance requiring said streets to be graded and macadamized as provided in the ordinance. On the 27th day of September an ordinance was passed providing for establishing the grades of certain streets, including Sherman and Deadwood streets, on which the property of the appellant abutted. The grade so established resulted, as claimed by respondent, in leaving the buildings upon his property considerably lower than the street. No notice seems to have been taken of appellant's protest on the part of the city council. Under the ordinance adopted by the city, contracts were let, and Sherman and Deadwood streets were graded and macadamized, and otherwise improved, upon the new grade so established; and for such grading and macadamizing the appellant was assessed about $900, and, failing to pay the same, his property was sold therefor, and certificates issued, which were redeemed by him, as before stated.

On the trial of the case there was evidence introduced on the part of the appellant tending to prove that the grade of these streets had been previously established by the board of county commissioners, at a time when they had authority to establish the grade of the streets of the city of Deadwood. The court found, however, that no valid ordinance establishing such grade had been adopted. But in our view of the case this finding is not material. In Searle *v.* City of Lead this court, in an opinion handed down since this appeal was taken, held that the provisions of section 13, art. 6, of the state constitution, declaring that private property shall not be taken for public use or damaged unless compensation be first ascertained and paid, are not controlled by section

Streets—Change of Grade—Damages—Constitutional Provisions.

18, art. 16, c. 37, of the Laws of 1897, and that the provisions of the constitution are not limited to the change of grade legally established, but apply to cases where a new grade of the streets is established. 10 S. D. 312, 73 N. W. 101. Whether or not, therefore, the grade of Sherman and Deadwood streets had been previously established by a legal ordinance, does not affect the rights of the parties in this case.

The appellant contends that the city had no right to raise the grade of, and grade and macadamize the streets adjoining his property, without first proceeding to ascertain the damages which he would sustain by reason of such change of grade, and paying or tendering to him the amount of such damages. We are of the opinion that the appellant is right in his contention. If the appellant erected his buildings with reference to the grade of the streets at the time they were so erected, he was entitled to such damages as he might sustain by reason of a change in such grade. It was the duty of the city, therefore, before proceeding to grade and macadamize the streets in accordance with the newly-established grade, to take the proper proceedings to ascertain the damages which property holders along these streets might sustain by reason of the new grade. Failing to do this, the city could not legally impose any share of the expense of making the improvements upon the appellant. The sale of his property for these improvements, therefore, was not authorized by law.

Same—Same—Same.

It is further contended on the part of the appellant that the proceedings of the city were illegal for the reason that the property was not sold at that time specified in the charter. The charter in force at that time provided for a sale of the property of delinquent taxpayers on the first Mondays of December and March in each year. The sale in this case was made on the 20th of December. This was not a compliance with the statute. It is a well-settled rule that

Local Assessments—Sale of Delinquent's Property—Compliance with Statutory Requirements.

when municipal corporations seek to impose upon property owners the burden of the cost of street improvements, and to hold the property of abutting owners liable therefor, the constitution, statutes, and charter authorizing such improvements must be strictly complied with. Mason *v.* City of Sioux Falls, 2 S. D. 640, 51 N. W. 770, 39 Am. St. Rep. 802. "When the statute under which the sale is made directs a thing to be done, or prescribes the form, time, and manner of doing anything, such thing must be done, and in the form, time, and manner prescribed, or the title is invalid; and in this respect statutes must be strictly, if not literally, complied with." Chandler *v.* Spear, 22 Vt. 398; Cooley, Tax'n, 287; 2 Desty, Tax'n, 842. Why the sale was not made at the time designated in the law, we are not able to say; but, as the time was fixed by law, it was the duty of the city officers to make the sale at the time prescribed.

Same—Validity—Establishment of Street Grade after Making Contract—Notice to Property Owner.

Again, it appears that the grade of the streets was established subsequent to the adoption of the resolution declaring the necessity for the improvements, and the ordinance providing for the improvements and the contracts made thereunder. If in establishing a new grade there was a material change in the grade as it formerly existed, then the prior proceedings were rendered invalid, and new proceedings should have taken for grading, macadamizing, and otherwise improving the said streets. Mason *v.* City of Sioux Falls, *supra*. For these failures of the city to comply with the law, we are of the opinion that the assessment upon the appellant's property was invalid, and the judgment of the circuit court is reversed.

FULLER, P. J. (dissenting). The motion to dismiss the appeal ought to be sustained, as the necessity of an injunction ceased upon the payment of taxes and cancellation of the certificate of tax sale, and no issue was left to be litigated. The fact that a controversy no longer exists between the parties may be shown at any time before final review; and voluntary payment of municipal taxes made the basis of

an action to determine their legality leaves nothing for investigation, and requires a dismissal of the appeal on motion. Little *v.* Bowers, 134 U. S. 547, 10 Sup. Ct. 620, 33 L. Ed. 1016; West *v.* Fitzgerald, 72 Iowa 306, 33 N. W. 688; Parker *v.* Bilgery (La.), 17 South. 846; Hipp *v.* Crenshaw, 64 Iowa 404, 20 N. W. 492; Gold-Mines Co. *v.* Brown, 20 C. C. A. 264, 74 Fed. 12; Rolette Co. *v.* Pierce Co. (N. D.), 80 N. W. 804. "Nor will the court pass on the merits merely for the purpose of relieving the appellant from a judgment for costs, as costs are merely an incident of a litigation." Bank *v.* Kaeppler (N. D.), 75 N. W. 253. With reference to actions against municipal corporations to recover back money paid them for taxes, JUDGE DILLON says: "The payment by the plaintiff must have been made upon compulsion,—as, for example, to prevent the immediate seizure of his goods or the arrest of his person,—and not voluntarily. Unless these conditions concur, paying under protest will not, without statutory aid, give a right to recovery." 2 Dill. Mun. Corp. p. 1145. The true rule seems to be as stated in Commissioners *v.* Walker, 8 Kan. 431, as follows: "Where a party pays an illegal demand, with full knowledge of all the acts which render such demand illegal, and without an immediate and urgent necessity therefor, unless to release his person or property from detention, or to prevent an immediate seizure of the same, such payment must be deemed to be voluntary, and cannot be recovered back; and the fact that the party at the time of making the payment filed a written protest does not make the payment involuntary." Of course, it is not my purpose to treat this as an action in assumpsit for money had and received, nor to intimate that in no event can taxes actually paid be recovered back. The doctrine of the cases is invoked only in so far as applicable to this motion. The record, as presented, discloses no duress, coercion, or compulsion, but, on the contrary, the payment of taxes merely to avoid a cloud arising from the issuance of a tax deed. As a matter of law, such payment was voluntary, and sufficient to extinguish every meritorious issue not disposed of by the former decision of this court. 81 N. W. 910.

COOK FARM CO., LIMITED, *et al.*

*v.*

CITY OF DETROIT *et al.*

(*Supreme Court of Michigan, June 5, 1900.*)

**Officers—Appointment by City Council—Authority of Legislature to Increase Powers.**—The legislature cannot confer the power to impose, directly or indirectly, any burden of construction upon citizens' property by assessment, upon a board of water commissioners consisting of members appointed by the city council, when the powers of such board were less than such power, and its members were not selected with a view to the exercise of such power.

APPEAL by defendants from Wayne county, circuit court in chancery. *Affirmed.*

*Charles D. Joslyn*, for appellants.

*Walker & Spalding*, for appellees.

HOOKER, J. In 1897 the legislature passed an act amendatory of the Detroit water board act, designed to provide for defraying the expense of the extension of water mains, including street intersections, by assessment upon the private property (*i. e.* land) abutting the streets in which the mains should be laid upon a basis of the frontage of the respective lots irrespective of value. Acting under this amendment, the water board laid a main, and the cost was assessed upon property belonging to the complainants. The act provides that "whenever, in the judgment of said commissioners, it shall be necessary to lay and construct water pipes and mains in and through streets and alleys in which no water pipes and mains now are laid, it shall be the duty of said commissioners to declare by resolution that, in their opinion, such necessity exists, specifying in such resolution the streets or alleys through which it is proposed to extend or lay such

pipes, and the size, material, and estimated cost thereof. Such resolution shall fix a time and place when said commissioners will hear any persons desiring to object to such proposed construction and extension of such water pipes and mains. Said commissioners shall cause notice to be published in one or more daily papers printed in the English language in said city for at least five days prior to said time fixed for hearing said matter that it is proposed to levy an assessment upon the land or lands abutting the street or alley through which it is proposed to lay and construct such pipes and mains, for the cost thereof. At the time fixed for such hearing, or at such time to which the same may be adjourned, such commissioners shall attend for the purpose of hearing and deciding upon objections thereto, and if no sufficient cause to the contrary be shown, the said commissioners may cause the said water pipes and mains to be laid and constructed as set forth in said resolution, and an accurate account shall be kept of the cost thereof. When the work of laying and constructing such pipes and mains is fully completed and performed, the said commisisoner shall report the completion thereof to the common council, and shall at the same time report the cost thereof. Upon receiving such report it shall be the duty of the common council to cause the sum so reported to be assessed upon the lot abutting the street or alley through which said water pipes and mains have been laid, in proportion to the frontage of such lot or lots: provided, that no lot shall be assessed on more than one front, and where such pipes and mains are constructed across more than one front of a lot, only the shortest front shall be estimated in making the assessment: and provided, further, that no lot or lots shall be assessed for a (larger) sum than its proportionate share for laying and constructing a pipe or main six inches in diameter, and that whenever it shall have been necessary, in the judgment of said commissioners, to lay and construct pipes and mains of a larger size than six inches in diameter, through the whole or any part of such extension, then said commissioners shall determine

the cost and expense of laying and constructing pipes and mains six inches in diameter, and such sum shall be reported to the common council for assessment in lieu of the actual cost of such larger pipes and mains. Property already supplied with water shall not be assessed for water mains and pipes (hereafter) heretofore laid, nor shall property once assessed for water pipes and mains under this act be liable for any additional or further assessments therefor. The sums so reported as aforesaid shall be levied and collected by the same officers that levy and collect assessments for the construction and building of lateral sewers, and in such manner as the common council may by ordinance prescribe." Laws 1897, No. 477.

It is admitted that the acts complained of in this case were done while the majority of the board consisted of members appointed by the council, before the enactment of the amendment of 1897, and it appears to be conceded that, under the pre-existing statute, the board had not the power to impose any burden of construction upon citizens or property by assessment. Counsel for the appellee contend that it was not within the power of the legislature to confer upon officers appointed before the passage of the act the power to lay pipe and impose an assessment upon abutting property, either directly or indirectly, by requiring the council to do so in conformity to the report of the water board. The case of Board of Park Com'rs *v.* Common Council of Detroit, 28 Mich. 228, is alleged to be conclusive of the question. In that case a board had been provided for, with authority to make conditional contracts for lands suitable for a public park, subject to ratification by a meeting of the citizens. The law provided that, after ratification by the citizens, the council might issue bonds of the city to pay for the land. Conditional contracts were made, and two meetings of the citizens were held, without result. Subsequently an amendment was passed by which the then existing board was authorized to locate suitable lands, and report the same to the common council, with an estimate of the amount necessary to pay for

the same, and it was provided that thereupon the council should provide money for the purpose. It was said by the court: "It will be seen from this that the board of park commissioners are to have discretionary and unrestricted power in the location of the park or boulevard, or both, and in determining the amount of debt the city shall incur for the purpose, within the limits prescribed by the act, and the only discretionary authority left with the council is that the act authorizes that body to determine the rate of interest on the bonds, not exceeding seven per cent., the sums in which they shall be issued, and the time when they shall be payable, which shall not be less than thirty, nor more than fifty, years." The authority of the legislature in matters pertaining to the regulation of the duties which the people of a locality owe to the commonwealth at large was recognized, and the necessity of consulting them denied. Upon the other hand, it was said that the legislature had no authority to compel them to submit to taxation in matters which apply merely to those necessities or conveniences adapted to the local conditions, and in which the state has no concern, as illustrations of which the furnishing of light and of water to the citizens are mentioned. See Bailey *v.* Mayor, etc., 3 Hill 531. It is unnecessary to repeat the arguments used in support of the decision, which may as well be read. That case is decisive of this, unless we are to say that there should be a distinction drawn between a provision for waterworks and one for a public park, for which we see no sound reason. While it was doubtless competent for the legislature to proscribe the board through which action might be taken to lay water mains, if it could confide the matter to such a board to be thereafter appointed to the exclusion of the common council,—a question which we are not called upon to decide,—it could not confer such power upon a board consisting of members previously appointed, at a time when its powers were less, and who were not selected with a view to the exercise of such powers. We are of the opinion that the act was void, and the decree is affirmed, with costs. The other justices concurred.

CALLAHAN

*v.*

CITY OF BOSTON.

(*Supreme Judicial Court of Massachusetts, Jan. 5, 1900.*)

**Constitutionality of Statute Making Municipality Liable for Wages of Contractor's Employees.**—Mass. St. 1892, c. 270, is not unconstitutional because its effect is that, if a city or town sees fit voluntarily to order the construction of public works to be owned by it, then *nolens volens*, it must assume a part of the responsibility of an employer to the workmen employed by the contractor with whom it deals.

APPEAL by defendant from Suffolk county superior court. *Affirmed.*

*Samuel M. Child*, for appellant.

*A. D. Moran* and *F. P. Curran*, for appellee.

HOLMES, C. J. It is not denied that the defendant is liable to the plaintiff under St. 1892, c. 270, if that statute is constitutional. The effect of that act is that, if a city or town sees fit voluntarily to order the construction of public works owned by it, then, *nolens volens*, it must assume a part of the responsibility of an employer to the workmen employed by the contractor with whom it deals. It is intended to be a milder application of the principle of the mechanic's lien laws. We see no constitutional objection to the law. It is a familiar type of statute, and has been upheld heretofore. Hart *v.* Railroad Co., 121 Mass. 510. A compulsory relation of master and servant is not unknown even to the common law. Benjamin *v.* Dockham, 134 Mass. 418. Judgment for the plaintiff.

## COVERDALE *et al.*

*v.*

## EDWARDS.

*(Supreme Court of Indiana, Oct. 30, 1900.)*

**Evidence—Pleading—Harmless Error.**—It was harmless error to sustain a demurrer to defendant's answers in justification, if they were allowed under their general denial to introduce all the evidence that would have been admissible under such answers.

**Streets—Right to Remove Electric Light Poles—Construction of Municipal Grant.***—A person was maintaining in the streets of a city poles, wires, and other necessary appliances for the purpose of supplying electric or other light, under a municipal grant providing that "the said council hereby reserve the right to revoke this grant and demand that the poles be removed, and remove the same if necessary." *Held*, that the grant was a bare license, revocable without cause at the will of the city council, and that if the licensee, at the revocation of the grant, should not remove the poles on demand, the council might cause their removal.

**Streets—Maintenance of Electric Light Poles—Municipal Authority—Statute.**—Under section 4303, Burns' Rev. St. 1894, the city in question had the unqualified right to grant or refuse at discretion the privilege of erecting and maintaining in the public streets poles, wires, and other necessary appliances for supplying electric or other light. *Held*, that such right carried with it authority to limit the line of such use of streets.

**City Council—Resolutions—Preambles.**—If the term of a resolution of a city council are unambiguous, its preamble cannot be allowed to cast a doubt upon its meaning.

**Same—Same—Motives of Councilmen.**—The motives or influences that led the city councilmen to pass the resolutions requiring plaintiff to remove his electric light poles, etc., from the streets could not be material, if the subject-matter of the resolutions was within the scope of their authority.

**Nuisances—Electric Light Poles—Summary Removal.**—Electric light poles erected and maintained in a city street without authority, or maintained there after such authority has been cancelled and

*See note at end of case.

their owner has been notified to remove them, are public nuisances *per se*, and the city may remove them summarily.

**Same—Same—Same—Motion for New Trial—Liability of Officers.**—In an action against the city councilmen, the city marshal and his assistants, and the attorneys of the city, for maliciously cutting down certain poles and electric wires, the councilmen's defense of justification was established, but their motion for a new trial could not be sustained on the ground that the verdict was contrary to law, unless there was no liability on the part of the marshal, for their motion was joint with that of the marshal, and the marshal and his assistants were liable for any abuse by them of the city council's order of removal; and on the question whether the marshal caused more than unavoidable injury in removing the poles and wires the evidence was conflicting and therefore the verdict could not be disturbed on that account.

**Same—Same—Improper Removal—Measure of Damages.**—In such an action, the measure of damages for improperly removing poles and wires is the difference in value between the poles and wires properly removed and as they were actually removed.

**Excessive Verdict.**—All of the defendants were entitled to a new trial on the ground that the damages were excessive.

**City Attorneys—Liability as Advisers of City Council—Sufficiency of Evidence.**—Such city attorneys, they having correctly advised the city council in respect to the city's authority to remove from the streets plaintiff's poles and wires, could not have been liable because of such advice, and their joint motion for a new trial, which was separate from the motion of all the other defendants, should have been sustained on the ground that the verdict was contrary to law.

**Pleading—Defenses.**—Justification is a defense which must be affirmatively pleaded.

APPEAL by defendants from Allen county circuit court. *Reversed.*

*Mann & Beatty*, *J. T. France*, and *O. N. Cranor*, for appellants.

*Peterson & Peterson*, *Henry F. Colerick*, *C. J. Lutz*, *R. K. Erwin*, and *Paul G. Hooper*, for appellee.

BAKER, C. J. This action was begun in the Adams circuit court. The venue was changed to Wells, and thence to Allen.

Case Stated.

Appellee's complaint charged that appellants, in pursuance of a conspiracy to injure appellee, maliciously cut down certain poles and electric wires belonging to appellee, and lawfully maintained by him in the streets of the city of Decatur, Ind., thereby destroying his property and business, to his damage in the sum of $15,000. Appellants filed answers in general denial and in justification. Appellee's demurrer was sustained to the answers in justification. The trial resulted in a general verdict and judgment in favor of appellee for $4,000. Appellants' joint motion for a new trial was overruled. The joint motion of two appellants, the city attorney of Decatur and his law partner, for a new trial, was overruled. Errors are assigned on each adverse ruling.

Evidence—Pleading—Harmless Error.

Inasmuch as the appellants admit in their brief that the court allowed them, under their general denial, to introduce all the evidence that would have been admissible under their answers in justification, the error, if any, committed in sustaining the demurrer was not injurious.

The principal contentions are that the verdict is not sustained by the evidence, and is contrary to law, and that the damages are excessive. Of the thirteen appellants, five were councilmen of the city of Decatur, one was the city attorney, one was the city attorney's law partner, who joined in advising the council, one was the city marshal, and five were persons employed by the city marshal to assist him in executing the commands of the council. In 1889 the council adopted the following resolution: "Resolved, that the Thomson & Houston Electric Light Company be, and are hereby, given and granted permission to plant and erect poles in the streets and alleys of Decatur for the purpose of stringing wires thereon to furnish electric lights to the citizens of said city. The planting of such poles shall be made under the direction of the street commissioner of said city, and he shall see that the same are not erected so as to inconvenience said citizens. The said council hereby reserve the right to revoke this grant,

and demand that the poles be removed, and remove the same, if necessary." The Thomson & Houston Company erected certain poles and wires, and afterwards conveyed the property to appellee, and assigned to him the rights under the foregoing resolution. The city did not formally consent to the assignment, but in 1893 the city entered into a contract with appellee, whereby appellee was engaged to supply the city with a certain number of street lights for three years at so much per light per year. After the expiration of this contract the city decided to put in an electric light system for itself. On August 18, 1897, the council adopted the following resolution: "Whereas, the common council of the city of Decatur, Indiana, on the 10th day of February, 1893, entered into contract with one J. D. Edwards, whereby said Edwards agreed to supply the city of Decatur with a certain number of street lights for the term of three years at a certain price per light per annum, which contract is spread of record in the record of proceedings of the common council of the said city of the date of February 21, 1893; and whereas, the contract under which the said Edwards furnished the said city with electric lights expired on the 10th day of February, 1896, and has not been renewed, but was, by resolution of the said common council, discontinued on the 13th day of July, 1897; and whereas, under the said contract, the said Edwards erected a number of poles in the streets, alleys, and public grounds of the said city, and strung wires and lamps thereon for the purpose of supplying the said electric lights to said city for street purposes, which poles, wires, and lamps are now not being used, and are in the way of others which the said city proposes to erect for the construction of an electric light plant to be owned and controlled by the said city: Therefore, be it resolved, that the city marshal be, and he is hereby, directed to notify the said J. D. Edwards to take down and remove all his poles from the streets and alleys and public grounds of the said city within fifteen days from the date of the receipt of the notice, or the same will be removed by said marshal

under and by order of the common council; and be it further resolved that, should the said Edwards fail or refuse to remove or cause to be removed all such poles, wires, and lamps from the said streets, alleys, and public grounds within the time mentioned in the said notice, the said marshal shall procure sufficient help, and remove the said poles, wires, and lamps immediately thereafter." On August 19, 1897, the marshal served upon appellee the following notice: "To J. D. Edwards: You are hereby notified that the common council passed a resolution at their meeting held August 18, 1897, ordering the removal of all your poles, wires, and electric lamps from the streets, alleys, and public grounds of the city of Decatur, Indiana, within fifteen days from the date of the receipt of this notice by you. You are therefore hereby notified to remove or cause to be removed all the electric light poles, wires, and lamps now erected and maintained by you in any of the streets, alleys, and public grounds in said city within fifteen days from this date, or I will, under orders of the said council, cause the same to be taken down and removed far enough that they will not interfere with the erection of new poles, wires, and lamps to be erected by said city. Dated this 19th day of August, 1897. M. F. Cowan, City Marshal." At the time of passing the resolution of August 18, 1897, the members of the common council did not know of, or did not remember, the grant of 1889. Appellee removed some of the poles and wires that had been used in lighting the streets, but left standing others of that line, and all of the line used in supplying lights to individuals. By September 28, 1897, the construction of the city's line had reached the places where appellee's poles and wires were left standing. The marshal had not yet executed the order contained in the resolution of August 18th. At their regular meeting on the evening of September 28th the common council, in executive session, passed the following resolution: "Whereas, on the 18th day of August, 1897, the common council of the city of Decatur, Indiana, ordered the removal of the electric light poles, lamps, and wires of J.

D. Ewards from the streets, alleys, and public grounds of said city within fifteen days from the date of the receipt of notice by him; and whereas, in accordance with the resolution then adopted, the marshal of the city then notified the said Edwards on the 19th day of August, 1897, to take down and remove within fifteen days all of such poles, wires, and lamps from the streets, alleys, and public grounds of said city; and whereas, the said Edwards has only partially complied with the requirements of said resolution, and has left standing on Main or Second street, between Jefferson and Jackson streets, all his poles, lamps, and wires the same as before the adoption of said resolution and service of such notice; and whereas, it is imperative that the city of Decatur shall have the immediate use of Second street from Jefferson street to Jackson street on both sides thereof: Therefore, be it resolved, that the city marshal be, and he is hereby, ordered to employ sufficient force of men to immediately remove from said Second street between Jefferson street and Jackson street all poles, wires, and lamps belonging to said J. D. Edwards by removing the wires and lamps and cutting down the poles, doing as little damage to the poles, wires, and lamps as, under the circumstances, is practicable." After the adjournment of the meeting, some of the members of the common council directed the marshal to remove appellee's poles and wires that night. One of the attorneys notified a workman that the marshal would need his services. About 2 o'clock that night the marshal and his assistants cut the wires, and sawed off the poles from six inches to two feet above the ground. The consequence was that appellee was unable longer to conduct his business. The marshal and those who assisted him in removing the poles and wires acted solely in obedience to the orders of the council, and not at all from any intention or willingness to injure appellee. The foregoing facts are shown by the evidence without conflict.

The objections to the evidence and the disputes as to the facts arose mainly with reference to the motives of the coun-

cilmen and the amount and elements of damages. The councilmen claimed that in deciding that the city should own a plant for itself, and in passing the resolution hereinabove set forth, they in good faith exercised only their best judgment as councilmen in the city's interests. They claimed that in ordering the removal of the poles and wires during the night of September 28th they were influenced only by the considerations that the city needed the immediate use of the streets, that the removal at night would avoid interference with traffic, and possible accidents to onlookers, and breaches of the peace, and that further postponement might result in the city's becoming involved in a suit by appellee to restrain any removal. On the other hand, there was evidence from which a jury might infer that some of the appellants who were councilmen were actuated by a malicious intention to injure appellee. The court, in the admission of evidence and in the instructions to the jury, submitted the question of damages on these elements: The destruction of appellee's business; the lost of the power house, erected on leased ground, and forfeited under a condition by which appellee's rights should continue only so long as he conducted his electric light business; and the difference between the poles, wires, and lamps when standing ready for use and when torn down. Appellee had been making $100 a month net from the operation of his plant. The highest valuation on the power house was $500. The highest valuation on the poles, wires, and lamps when standing ready for use was $511. The lowest valuation on the poles, wires, and lamps when torn down was naught.

The first question concerns appellee's rights in the streets at the time of the alleged trespass. The control of streets, as well as of all other public highways, is primarily in the legislature. But the legislature has delegated to municipalities the exclusive control of their streets and alleys. Section 3161, Rev. St. 1881 (section 3161, Horner's Rev. St. 1897; section 3023, Burns' Rev. St. 1894). As the legislature gave, so

Streets: Right to Remove Electric Light Poles.—Construction of Statutes.

that body may take away or modify, the power. There is no doubt of the legislature's authority to grant to individuals and corporations the right to erect poles and wires upon the streets of a municipality without its consent, or over its objection. Town of New Castle *v.* Lake Erie & W. R. Co. (Ind. Sup.), 57 N. E. 516, and cases there cited. But the legislature, far from granting such a right, has expressly committed this subject to the discretion of the municipality. Section 4303, Burns' Rev. St. 1894 (section 3106c, Horner's Rev. St. 1897), provides that any city is hereby authorized to grant by resolution or ordinance, under such restrictions as the common council may deem proper, to any person or corporation, the right to erect and maintain in the streets, alleys, and other public places in such city posts, poles, wires, and other necessary appliances for the purpose of supplying electric or other light. The grant to the Thomson & Houston Company was made under this statute. It was a personal license, not assignable without the consent of the city. But the contract of 1893 ratified the assignment, and made the license irrevocable during the life of the contract. At the expiration of the contract, appellee stood as the lawful assignee of the Thomson & Houston Company's license. That license contained this provision: "The said council hereby reserve the right to revoke this grant, and demand that the poles be removed, and remove the same if necessary." The language is clear, and the meaning unmistakable. The grant was a bare license, revocable without cause at the will of the council. If the licensee, at the revocation of the grant, should not remove the poles on demand, the council might cause their removal. Appellee claims that under section 4303, Burns' Rev. St. 1894, (section 3106c, Horner's Rev. St. 1897), the council may restrict the method of use, but may not limit the time. The legislature confided an unreserved discretion to the council. The unqualified right to grant or refuse at discretion carries with it the right to impose any terms on the grant not forbidden by law. The discre-

Streets—Maintenance of Electric Light Poles—Municipal Authority—Statute.

tion of the council is not confined by the law to the mere restriction of methods of use, and therefore extends to restriction of time. City of Indianapolis *v.* Navin, 151 Ind. 139, 143, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344; Citizens' St. R. Co. *v.* City R. Co. (C. C.), 64 Fed. 647, 656.

Appellee next contends that, even if the council had the right to terminate the license as a whole, the resolution of August 18th and the notice of August 19th were not effective to end appellee's right to maintain his commercial plant. The argument is based on recitals in the preamble. The preamble is no part of the resolution. A preamble may be looked to in aid of the interpretation of an ambiguity in a resolution; but, if the terms of the resolution are clear, a preamble cannot be allowed to cast a doubt upon the meaning. 23 Am. & Eng. Enc. Law, 329–331. Here the resolution in explicit terms ordered appellee to remove all his poles that were maintained in the streets and alleys of Decatur, and the notice followed the resolution. But, if outside matters were to be taken into consideration in determining the meaning of the resolution, the fact that the council on August 18th had forgotten, or did not know of, the Thomson & Houston Company's license, would indicate that they supposed that appellee had no license except the one which was implied by the contract of 1893, and which became a bare license, revocable at will in 1896. Under this view the preamble, like the body of the resolution, was aimed at appellee's entire system.

City Council—Resolutions—Preambles.

Appellants, in their relations to the resolutions and acts thereunder, are naturally divisible into three groups,—the councilmen, the marshal and those who assisted him in the removal of the poles, and the attorneys of the city. The motives or influences that led the councilmen to pass the resolutions were irrelevant if the subject-matter was within the scope of their authority. Throop, Pub. Off. § 709; Mechem, Pub. Off. §§ 644–646; Buell *v.* Ball, 20 Iowa 282; Borough of Freeport

Same—Same—Motives of Councilmen.

*v.* Marks, 59 Pa. St. 253. What poles and wires should be permitted in the streets was a question in relation to which the councilmen owed a duty to the public, and not at all to individuals. If an individual was affected, it was immaterial, unless a contract was violated. The nature of appellee's contract right in the street has already been considered. The council had authority to terminate the license at will. The remaining question is in regard to the steps the city might lawfully take in effecting the removal of the poles and wires. There is no doubt of the right of the city to begin legal proceedings to that end (American Furniture Co. *v.* Town of Batesville, 139 Ind. 77, 38 N. E. 408), and appellee claims that this was the only way. Is that true? If appellee had erected the poles in the streets without any lawful authority to do so, the poles would have constituted a public nuisance *per se*. City of Valparaiso *v.* Bozarth, 153 Ind. 536, 55 N. E. 439, 45 L. R. A. 487, and cases cited. If the poles were erected under lawful authority, and if the authority was legally canceled, appellee's failure or refusal to remove the poles after notice would render them a nuisance *per se*, and the city's right would then be complete to remove them summarily. City of Indianapolis *v.* Miller, 27 Ind. 394; Baumgartner *v.* Hasty, 100 Ind. 575; Telegraph Co. *v.* Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454; note to City of Orlando *v.* Pragg (Fla.), 19 L. R. A. 196 (s. c. 12 South. 368); note to City of Evansville *v.* Miller (Ind. Sup.), 38 L. R. A. 161 (s. c. 45 N. E. 1054). So it appears that in respect to both the termination of appellee's license and the method of effecting the removal of the poles the subject-matter of the resolution was within the scope of the authority of the councilmen. As the evidence fails to show that they advised or assisted in any abuse of the order of removal, the record establishes their defense of justification. But their motion for a new trial cannot be sustained on the ground that the verdict is contrary to law, unless there is no liability on the part of the marshal and his assistants, for their motion

Nuisances—Electric Light Poles—Summary Removal.

Same—Same—Same—Motion for New Trial—Liability of Officers.

is joint with that of the marshal. The marshal and his assistants are liable for any abuse of the order of removal. Throop, Pub. Off. § 724; Mechem, Pub. Off. § 664. On the question whether the marshal caused more than unavoidable injury in removing the poles and wires the evidence is conflicting, and therefore the verdict cannot be disturbed on that account. But the damages awarded are clearly excessive. The unfortunate destruction of his business fell upon appellee as the proximate result not of the marshal's abuse of the order of removal, but of the termination of his license, and the order of removal properly executed. The loss of his power house was due to the terms of appellee's lease, and was not legally attributable to the marshal's acts. Even with respect to the poles and wires, the question of damages was not properly submitted to the jury. The measure is the difference in value between the poles and wires properly removed and as they were actually removed. All of the appellants are entitled to a new trial on the ground that the damages are excessive.

Same—Same—Improper Removal—Measure of Damages.

Excessive Verdict.

As the city's attorneys correctly advised the council in respect to the city's authority, no question arises as to the circumstances under which, and the persons to whom, the attorneys would be liable for wrong advice. The evidence fails to show that they counseled or assisted in any abuse of the order of removal. Their joint motion for a new trial, separate from that of all the appellants jointly, should have been sustained on the ground that the verdict is contrary to law.

City Attorneys—Liability as Advisers of City Council—Sufficiency of Evidence.

Justification is a defense that must be affirmatively pleaded. On the trial now in review, appellants were not injured by the ruling on the demurrer, because they admitted that they were permitted to introduce all their evidence under the general denial. But on a new trial appellants should have a legal basis for the introduction of their evidence. Judgment reversed, with directions to overrule the demurrer to the affirmative answers.

Pleading—Defenses.

Note

**Streets and Sidewalks—Removal of Poles.**—A municipal corporation may remove as obstructions poles and wires which it authorized to be placed in the streets for the carrying out of a contract to light the city after such contract has ceased. Hempstead *v.* Ball Electric Light, 41 N. Y. Supp. 124.

The fact that a contract for lighting a city was *ultra vires* and void does not authorize the city to unreasonably destroy poles which had been located in its streets for that purpose, nor to remove them without giving reasonable notice. Wellston *v.* Morgan, 59 Ohio St. 147, 52 N. E. 127.

In Krueger *v.* Wis. Tel. Co. (Wis.), 81 N. W. Rep. 1041, it was held that an abutting owner who had not consented to the erection of a pole and wires before his window could recover damages and have judgment for their removal, as such obstruction constituted a continuing trespass.

If the location of an electric light pole is not only injurious, but unnecessary, mandatory injunction will be granted to compel its removal. Snyder *v.* Ft. Madison St. R. Co., 105 Iowa 284, 11 Am. & Eng. R. Cas., N. S., 53, 41 L. R. A. 345.

Where poles have been placed without proper authority having been obtained mandatory injunction will lie to compel their removal. Broome *v.* New York, etc., Tel. Co., 42 N. J. Eq. 141.

A pole erected under legislative authority cannot be abated as a nuisance. Irwin *v.* Great Southern Tel. Co., 37 La. Ann. 63.

Where a telephone company has not complied with an ordinance requiring a license to be obtained before poles are erected in the streets, an abutting owner may cut down a pole placed in the sidewalk in front of his property. York Tel. Co. *v.* Keesey, 5 Pa. Dist. Rep. 366.

Where an ordinance authorizing a telephone company to use a city's streets provides that the council shall have the right to repeal the ordinance, the company is bound by such ordinance. Southern Bell Tel., etc., Co. *v.* City of Richmond, 98 Fed. Rep. 671, *affirmed* in 103 Fed. Rep. 31.

Though poles are erected by legislative authority they can be alleged to be an unlawful obstruction are nuisances if they exceed the ordinary height or size. People *v.* Metropolitan Tel., etc., Co., 31 Hun (N. Y.) 596.

A city cannot revoke a permission to a telegraph company to erect poles on a certain street where a company has expended money in placing the poles. Hudson Tel. Co. *v.* Jersey City, 49 N. J. L. 303.

A municipal corporation failing to reserve the right to rescind or limit the duration of a resolution granting an electric company the right to use its streets for poles and wires cannot rescind it after the wires have been put up. Suburban E. L. & P. Co. *v.* East Orange Tp. (N. J. Ch.), 41 Atl. Rep. 865.

## CITY OF COVINGTON

*v.*

## DIEHL.

(*Court of Appeals of Kentucky, Nov. 28, 1900.*)

**Streets—Personal Injuries—Knowledge of Defects—Pleading.***—In an action against a city for personal injuries claimed to have been caused by a defect in a street, the petition alleged that the street was in bad repair, containing deep holes and ravines, which was unknown to plaintiff at the time of the accident; and that the city was chargeable with knowledge of its condition, and failed to put it in a safe condition. *Held*, that such allegations placed the burden upon defendant of alleging and proving that it did not have time in which to repair the street after discovering the particular defect causing the accident.

**Same—Same—Same—Same—Defect Cured on Trial.**—In such action, if the petition was imperfect in failing to allege that defendant had been chargeable with knowledge of the defect a sufficient length of time to have enabled it to repair it before the accident, such defect in the petition was cured on the trial of the case, as the very issue was tried which would have been tendered if the petition had contained such an averment.

**Excessive Verdict.**—In such an action, the amount of the verdict, which was not only for mental and physical suffering, but for permanent injuries, did not warrant a reversal, as it did not appear to be so excessive as to indicate that it was given under the influence of passion or prejudice.

**Contributory Negligence—Instructions.**—In such action, defendant was not entitled to have an instruction given on the subject of contributory negligence, as there was no evidence offered by it upon which to base such an instruction.

APPEAL by defendant from Kenton county circuit court. *Affirmed.*

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*See Cloney *v.* City of Kalamazoo (Mich.), 4 Mun. Corp. Cas. 640, and *note*, p. 648 *et seq.*

City of Covington *v.* Diehl

*W. McD. Shaw*, for appellant.

*B. F. Graziam* and *G. F. Brughner*, for appellee.

PAYNTER, J. About nightfall, while going along a street of the appellant, and on a walk thereon which appears to have been provided for pedestrians, the appellee stepped into a hole about 12 inches deep and 12 inches across the top, resulting in the spraining of her ankle and injury to her back, and causing a miscarriage, all of which produced great mental and physical pain. After stepping into the hole she was unable to walk, and lay on the street until she was carried home. She was confined to her bed for some weeks, and at the trial of this case, some months after the accident, she was still suffering with her ankle and back, and had been unable to perform any labor since receiving her injuries. There is also some proof tending to show that it was possible that she would never fully recover from her injuries. It is averred that the street was in bad repair, containing deep holes and ravines, which was unknown to the plaintiff at the time of the accident; that the city of Covington and its officers knew of the condition of the street, or could have known of it by the exercise of ordinary care, and failed to repair it and put it in a safe condition. A trial of the case resulted in a verdict of $4,000 for the appellee.

Case Stated.

It is insisted that the petition is not good because it fails to allege that the particular place where the appellee was injured was known to exist by the appellant a sufficient length of time to have enabled it to repair it before the injury was received. The petition describes the place where the street was out of repair, but does not describe particularly the hole into which the appellee stepped which produced the injury. It describes a certain locality on the street where it contained holes. It was a matter of defense if the appellant desired to show that it did not have time in which to repair the street after discovering the hole, but if the petition had been defective it was cured on the trial of the case. Testimony was offered as to the

Streets—Personal Injuries—Knowledge of Defects—Pleading.

length of time the hole had been in the street, which tended to show that it was there during the month of July, and up until August 13th, the day on which the accident occurred. Under the instruction of the court, the appellee was not authorized to recover unless the appellant had a reasonable time in which to repair the street after discovering the hole, or after having a reasonable opportunity to have discovered it. So the very issue was tried which would have been tendered if the petition had contained the averment stated.

Same—Same—Same—Same—Defect Cured on Trial

It is insisted that the case should be reversed because the damages awarded are excessive. The verdict is not only for the mental and physical suffering that the appellee endured, but on account of the permanent injuries she has probably sustained. We cannot say, at first blush, that the verdict is so excessive as to indicate that it was given under the influence of passion or prejudice. Many cases could be cited where verdicts for larger amounts than this one have been sustained, where the mental and physical suffering and injuries sustained were less than in this case. It would be useless labor to collate these cases, because there is no way to fix a definite and certain amount as a proper amount for juries to award in this class of cases.

Excessive Verdict

The court told the jury that if the street or way whereon the plaintiff was injured was not, at the time and place of such injury, in a reasonably safe condition for the public to travel over it on foot, and if any defect existed which was not known to the plaintiff, and could not have been known to her by the exercise of ordinary care, and that she did exercise ordinary care in passing over it to avoid injury to herself, and that defendant knew, and by the exercise of ordinary care and diligence could or ought to have known, of its unsafe condition, and if after such condition became known to the defendant, or after defendant should or ought to have known, by the exercise of ordinary care and diligence, of its unsafe condition, and a sufficient time intervened before the injury

to plaintiff for the defendant to have repaired it, and the defendant failed to repair it, they should find a verdict for the plaintiff; otherwise for the defendant. The above is the substance of instruction No. 1, which the court gave the jury. Under that instruction, if appellee knew of the hole in the street, or by the exercise of ordinary care could have known of it, so as to have avoided it, then the jury was not authorized to find for her.

Counsel for appellant says the court failed to give an instruction on the subject of contributory negligence. The bill of exceptions shows that instruction No. 2, on the subject of contributory negligence, was offered on behalf of the appellant, and it is recited that the court gave it to the jury. It is wholly immaterial whether it did or did not give that instruction, as there was no evidence offered by the appellant upon which to base it. The judgment is affirmed.

Contributory Negligence—Instructions.

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PEOPLE *ex rel.* DYETT

*v.*

McMURRAY *et al.*

(*Supreme Court of Colorado, March 19, 1900.*)

**Railroad Tracks in Street—Nuisance—Removal—Remedies—Mandamus.***—Where a city council has charter authority to permit the laying of railroad tracks in the street, and to compel their removal therefrom so as to avoid unnecessary interference with the use of the street by the public or abutting owners, *mandamus* will not lie to compel the council to have tracks laid in a street without authority, removed on the ground that they constitute an obstruction, and a public and private nuisance; as the council in compelling their removal would be exercising a discretionary power.

APPEAL by plaintiff from Arapahoe county district court. *Affirmed.*

*See notes at end of case.

People *ex rel.* Dyett *v.* McMurray

On February 3, 1898, relator filed her petition in the district court of Arapahoe county for a writ of *mandamus* to compel the mayor and city council to take such action as might be necessary to accomplish the removal of a certain railroad track constructed in and along Wewatta street, in the city of Denver, and to compel the board of public works and commissioner of highways to co-operate with them in such action as they might take for that purpose. The relator is, and for two years prior to the filing of her petition has been, the owner of the northwesterly half of lot 7, block 36, West Denver, which abuts on the southeasterly line of Wewatta street for a distance of 132.5 feet. The material facts as set forth in the petition are, in brief, as follows: On August 15, 1881, the city council of Denver passed an ordinance granting a right of way to the Denver & New Orleans Railway Company to construct, maintain, and operate a single or double track railroad, with the necessary depots, shops, etc., along and across certain streets,—among others, "from its track in Third and Wewatta street on and along said Wewatta street to the west bank of Cherry creek; provided, that no more than one-third of the street should be occupied at any one point." That they might allow other railroad companies to run upon its tracks upon such terms as were agreed upon between the companies. In pursuance of the authority so conferred, the Denver & New Orleans Railway Company constructed two tracks in Wewatta street in front of the premises now owned by plaintiff, and in doing so occupied fully one-third of the street. Afterwards, in 1887, the Denver, Texas & Gulf Railway Company succeeded to the rights of the Denver & New Orleans Railway Company, and entered into a contract with the Denver & Santa Fe Railway Company, a leased line of the Atchison, Topeka & Santa Fe Railway Company, by virtue of which the last-named company has claimed and assumed the right to use, maintain, and operate for general railroad purposes its railroad, and to run its locomotives and cars along said street, between the points aforesaid, and over said track so placed thereon by said Denver & New

Orleans Railway Company. In the fall of 1887 the Denver & Santa Fe Railway Company, without authority or license from the city, and without the leave or consent of any of the owners of property abutting on that portion of Wewatta street, constructed thereon, between Fifth and Eleventh streets, about 19½ feet (from center to center of tracks) southeasterly from and parallel to the southeasterly of said two tracks placed there by said Denver & New Orleans Railway Company, and at a distance varying from 29.55 feet near Seventh street to a distance of 27.85 feet opposite petitioner's lot from the northwesterly lot lines between said points to the center of said track, a standard-gauge railway track, which the Denver & Santa Fe Railway Company, and, by its authority, the Atchison, Topeka & Santa Fe Railway Company, have ever since possessed and occupied in constant use for general railroad purposes, running its locomotives, cars, and trains over the same, and using it as its "main track"; thereby so obstructing the said street as to render the track and the use thereof a public and private nuisance. That the city authorities, although petitioned so to do by relator, not only refused to abate the same, but were about to adopt an ordinance which had been agreed upon between them and the railway company, by which the latter is to surrender its "Denver Circle" franchise, and convey certain lands to the city, in consideration that the city is to recognize and confirm the right of the company to maintain and operate the track complained of into the Union Depot. Incidental to the ultimate relief asked, relator seeks to enjoin the city authorities from adopting such ordinance. From the judgment of the court below dismissing the action, relator prosecutes this appeal.

*Charles H. Dyett*, *George L. Hodges*, and *Thos. H. Hardcastle*, for appellant.

*J. M. Ellis* and *Chas. E. Gast*, for appellees.

GODDARD, J. (after stating the facts). The controlling question presented is whether or not *mandamus* is the appro-

priate remedy, or can be invoked to obtain the relief sought. Counsel for appellant strenuously insist that it is, since the city council, by clause 37, § 20, of the city charter (Sess. Laws 1893, c. 78), is clothed with the power to provide for the removal of all obstructions from, and to prevent all encroachments upon, the streets within the city; that the power, being granted for the public benefit, is not discretionary, and its exercise becomes a duty which the city is bound to perform. In support of their position they rely upon Borough of Uniontown *v.* Com., 34 Pa. St. 293; Trustees *v.* Kinner, 13 Bush 334; People *v.* Mayor, etc., of Bloomington, 63 Ill. 207; Village of Glencoe *v.* People, 78 Ill. 383; Brokaw *v.* Commissioners, 130 Ill. 482, 22 N. E. 596. From an examination of these cases it will be seen that the duty there enforced was that of repairing the streets, or of removing a character of obstructions that the city council, under no circumstances, could authorize or permit. In these respects the facts in those cases were essentially different from those in the case at bar. By clause 44 of the section of the charter above referred to, the city council is authorized "to permit and regulate the running of railway cars propelled by steam, cable, electricity or other motive power, the laying down of tracks for the same; * * * and to compel them to remove their tracks so as to avoid unnecessary interference with the use of the streets by the public or by the owners of the abutting property." This court in several cases has recognized and affirmed such right. City of Denver *v.* Bayer, 7 Colo. 113, 2 Pac. 6; Railroad Co. *v.* Nestor, 10 Colo. 403, 15 Pac. 714; Railroad Co. *v.* Domke, 11 Colo. 247, 17 Pac. 777; Railway Co. *v.* Barsaloux, 15 Colo. 290, 25 Pac. 165. It is therefore clearly within the province of the city council, in the exercise of such power, to determine whether a railway track which has been laid in a street without authority shall be permitted to remain, or the necessary steps be taken to remove it. Their action in this respect must necessarily be governed by the circumstances of the particular

case, and involves the exercise of discretion and judgment, and is, therefore, not subject to the control of the courts by *mandamus*. Counsel, however, contend that, even conceding that the city council has the power, under the charter, to give license by ordinance for the locating of the track in question where it is in Wewatta street, that, not having granted such license, the occupation is, therefore, "without authority of law," and is an "obstruction," which it has been the duty of the city authorities for the past 10 years to abate; and that the status of the obstruction must be considered with respect to the time when the performance of the duty of the city officials to remove and abate the same was invoked on behalf of the public; and that duty must be performed in respect to that status, whatever the city authorities might see fit to do within the scope of any lawful powers vested in them thereafter. To this we cannot agree. At the time this remedy was invoked the authorities had taken steps to confer upon the railway company the right to use and operate the track as located, and were about to adopt an ordinance for that purpose. It would, therefore, be an idle ceremony for the court to adopt the suggestion of counsel, and compel them to remove the track, even if it had the power so to do, when they might immediately, in the exercise of their conceded authority, permit the company to replace it. We are therefore clearly of the opinion that in the circumstances of this case the relator is not entitled to the remedy asked, and that the court below properly dismissed the action. Its judgment is accordingly affirmed. Affirmed.

On Petition for Rehearing.

(May 21, 1900.)

PER CURIAM. In support of the petition for rehearing it is urged that the particular facts in the petition for *mandamus* upon which petitioner relies for relief, namely, that the track in question destroys all access to the property abutting on Wewatta street, have been overlooked. We fully understood and considered the averments of the petition in this respect.

Notes

As stated in the opinion, the controlling question is whether or not *mandamus* is the appropriate remedy or can be invoked to obtain the relief sought. The contention of counsel for appellant is that the city authorities may be compelled by *mandamus* proceedings to remove obstructions which virtually close the street as a public thoroughfare. In an appropriate action against the proper parties the question of the power of the municipal authorities to permit the obstruction complained of could undoubtedly be determined, but it cannot in this proceeding. The city has the authority to permit a street to be occupied by railroad tracks. This involves the exercise of discretion and judgment on the part of its proper officials. It is authorized to compel the removal of tracks which unnecessarily interfere with the use of a street by the public or by the owners of abutting property. The degree of obstruction, however, caused by such occupation, does not change the rule that the exercise of discretion on the part of municipal officials cannot be interfered with by *mandamus*; other wise, in every case where a track was laid upon a street, the question whether or not it resulted in unnecessary interference with its use would become the subject of inquiry through *mandamus*. This would result in transferring the government of municipalities to the judiciary, when, under the law, it is vested in the municipal officials. Petition for rehearing denied.

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NOTES.

Obstructions in Streets and Highways—Mandamus to Officers to Compel Removal.—*Mandamus* will not issue at the instance of abutting owners to compel a municipal corporation to force a railroad company to change the grade of its tracks where they cross a park or to build viaducts. Hoyne *v.* Illinois C. R. Co. (Ill. C. C.), 12 Nat. Corp. Rep. 430.

Where obstructions have been placed in a street by a railroad company under color of legislative authority, a writ of *mandamus* will not be granted to compel their removal by the commissioner of public works, especially where they are in a sparsely populated suburb which

Notes

is not likely to become thickly settled. People *v.* Manhattan R. Co. (N. Y.), 20 Abb. N. Cas. 393.

Where a city, under statutory authority, has authorized the erection of a news stand in the street, *mandamus* will not lie, at the instance of one having no special interest, to compel the removal of such stand. People *ex rel.* Simon *v.* New York, 45 N. Y. Supp. 900.

*Mandamus* will not lie to compel a street commissioner to have goods removed from wharves and levees within a certain time where he is only "authorized" to do so by the city ordinance in reference to such removals. State *v.* Fitzpatrick, 47 La. Ann. 1329.

*Mandamus* is not the proper remedy of an abutting owner where the city has permitted an obstruction to be placed before his premises. People *v.* Thompson, 32 Hun (N. Y.) 93.

Where the authorities of a borough have granted permission to an electric railway company to place poles in the streets, *mandamus* will not be granted to compel them to remove such poles nor to compel them to revise their decision. Commonwealth *v.* West Chester (Pa. C. Pl.), 9 Pa. C. C. Rep. 542.

*Mandamus* will issue to compel the supervisor of highways to remove obstructions therein. Patterson *v.* Vail, 43 Iowa 142.

It was provided by statute that several railroad companies having tracks in a city should have a common station and discontinue some of the tracks and that the city should extend a certain street and maintain a suitable track thereon, or partly thereon and partly on the discontinued location, to be connected with the tracks of one or more of the railroads in the city, "for the accommodation of the business establishments on the line of said extension which were accommodated by the tracks of" one of such railroads at the time of the passage of the act. *Held*, that, after the city had in its discretion constructed a track for the purposes named, the supreme court could not, on a petition for *mandamus*, exercise a supervisory power over the mode in which it was done, and determine whether a track in another place would better accommodate the petitioner. Rice, etc., Co. *v.* Worcester, 130 Mass. 575.

**Same—Same—Petition.**—Where a petition is filed for a writ of *mandamus* to compel the removal of an obstruction in a highway, it must show that such highway has not been abandoned, and must state that the proper official's attention has been called to the obstruction and its removal requested. Peck *v.* Board of Supervisors, 90 Cal. 384.

The complaint in a proceeding to obtain a writ of *mandamus* to compel a city to remove a railroad track in an alley does not sufficiently show that such use is unlawful where it merely charges that by reason of the constant and swift motion of large bodies of iron,

steel, and wood which are constantly and rapidly moved along and upon said alley, it is dangerous to pass along and upon it. State *v.* City of New Albany, 127 Ind. 221.

**Same—Same—Where Legal Existence of Highway Is in Question.**—Where the legal existence of a highway as such is in question, *mandamus* will not lie to compel a road overseer to remove obstructions therein. State *v.* Buhler, 90 Mo. 560.

Where the legal existence of a highway is contested in good faith by a stranger to the record, and the relator has other remedies, *mandamus* will not issue to compel the common council of a village to remove obstructions in such highway. French *v.* South Haven, 85 Mich. 135.

Where the alleged dedication and acceptance of a street is not clearly shown, and it appears that the granting of the writ of *mandamus* sought to compel the removal of obstructions in such street would touch the interests of third persons *bona fide* claiming ownership in the disputed property, the writ is properly refused. People *v.* Bloomington, 38 Ill. App. 125.

**Same—Same—Existence of Another Remedy.**—Where remedy may be had by indictment, *mandamus* will not issue to compel the removal of obstructions in a highway by the highway commissioner. Comm'rs *v.* People, 73 Ill. 203; Comm'rs *v.* People, 66 Ill. 339.

*Mandamus* will lie, under Ill. Rev. St. 1889, c. 121, § 2, to compel the commissioners of highways to remove obstructions, without regard to the existence of another legal remedy. People *v.* Comm'rs, 130 Ill. 482.

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## D'ESTERRE

*v.*

## CITY OF NEW YORK *et al.*

(*Circuit Court of Appeals, Second Circuit, March 7, 1900.*)

**Municipal Bonds—Validity—Effect of Failure to Observe Statutory Formalities.**—It was the intention of the statute in question that the municipal bonds for the creation of which it provided should be negotiable. And, as it also authorized the creation of coupon bonds at the discretion of the town supervisor, which were not to be registered even as to the principal sum, it was manifest that its provisions in respect to registration, in respect to their being made payable to the persons to whom they were issued, and in respect to all matters

merely of form and phraseology, were not designed as limitations of such officer's authority, or to protect the town against his abuse of his functions, and, therefore, such provisions were directory, and not mandatory, and, in the absence of any language in the act importing that noncompliance therewith would invalidate the bonds, no departure in respect to them could affect the validity of the bonds.

**Same—Same—Recitals.***—The fact that such municipal bonds erroneously recited the statute under which they were issued did not render them invalid, as a recital in municipal bonds can be material only as affording the basis of an estoppel against the municipality.

**Same—Same—Absence of Date and Name of Payee.**—The fact that such bonds were not dated and did not contain the name of any payee did not affect their validity, as neither a date nor a named payee is essential to the validity of negotiable instruments.

**Same—Same—Formalities—Special and General Statutes.**—The provisions of the General Statutes of New York respecting the form and registration of municipal bonds have no application to a case to determine as to the validity of municipal bonds created under a special statute of the state prescribing the formalities to be observed in this respect.

**Same—Same—Statutory Requirements—Bona Fide Holders.**—A person acquiring such bonds from the original purchaser without notice that the latter did not pay for them in cash, as required by the statute under which they were issued, was entitled to assume that the town supervisor had negotiated them regularly and legitimately.

**Same—Annexation of Town—Liability of Annexing City.†**—Although by the provisions of the act annexing the town of Gravesend to the city of Brooklyn the latter was not to be liable for the previous debts of the town, and the property of the city not acquired by the annexation was exempt from taxation for the payment of such indebtedness, the power and duty were devolved upon the city by the act to raise the moneys necessary to pay such indebtedness by taxation of the property annexed, and the creditors of the town could, before the enactment of the Greater New York charter, have compelled the authorities of the city of Brooklyn, by *mandamus*, to assess and collect the necessary tax, but neither the power thus devolved upon the city of Brooklyn, nor such remedy by *mandamus* existed after the creation of such charter, and such charter provided that the city of New York should succeed to all the rights as well as to all obligations of the municipalities thereby consolidated within it, but

*See Village of Kent *v.* Dana (C. C. A.), 4 Mun. Corp. Cas. 609, and *note*, p. 623.

†See *note*, 2 Mun. Corp. Cas., p. 540 *et seq.*

the town of Gravesend was not enumerated as one of such consolidated municipalities. *Held*, that outstanding bonds of the town were enforceable against the city of New York.

APPEAL by defendant from the circuit court of the United States for the eastern district of New York. *Affirmed.*

*John Whalen*, Corp. Counsel (*George L. Sterling*, of counsel), for appellants.

*Henry B. B. Stapler*, for appellee.
*Frederick P. Delafield, amicus curiæ*

Before WALLACE, SHIPMAN, and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal by the defendants from a decree for the complainant in a suit in equity establishing the validity of certain bonds created by the former town of Gravesend, directing the registration of the bonds by the defendant the comptroller of the city of New York, and adjudging that the city of New York pay the accrued interest upon the bonds in accordance with their terms.

Case Stated.

March 10, 1892, the legislature of the state of New York passed an act (chapter 118, Laws 1892) entitled "An act in relation to local improvements in the town of Gravesend, in the county of Kings," and March 22, 1893, passed an act amendatory thereof, and repealing all parts of the earlier act inconsistent therewith (chapter 171, Laws 1893). By these acts it was provided that the cost of all local improvements in the town of Gravesend should be paid in the first instance by the sale of bonds of the said town; and the supervisor of the town was empowered to borrow on its faith and credit the necessary amount, and in its name to execute and issue bonds therefor. The act of 1893 authorized such bonds to be exchanged for similar bonds theretofore issued, or to be sold to the highest bidder, and the proceeds used for the construction and carrying on of such improvements. In January, 1894, in order to provide for the payment of outstanding bonds of the town then about to mature, the

supervisor of the town, assuming to do so under the authority of these acts, issued 148 bonds, of the denomination of $1,000 each, advertised for bids, sold them to the highest bidder, and delivered them to the purchasers, a banking firm. The bankers, instead of paying cash for the bonds, were allowed by the supervisor to retain the purchase money, $148,000, and credit the town on their books with the amount, upon the understanding that they were to pay $30,000 on the 1st day of the next month, and the balance from time to time as required by the town for the payment of its outstanding bonds. February 2, 1893, the bankers pledged the bonds to the complainant as security for a loan from him of $23,000. The loan had been originally made by the complainant upon other security, but at the date in question these securities were surrendered, and the bonds in question substituted in their places. The bankers failed before paying to the town the purchase price of the bonds.

By an act of the legislature of May 3, 1894 (chapter 449, Laws 1894), the town of Gravesend was annexed to the city of Brooklyn. This act provided that the city of Brooklyn should not be liable to pay any debt, liability, or obligation of the town previously contracted or incurred, and that its property should not be taxed to pay any such liabilities. But it also provided that the property of the town should remain liable therefor, and that the moneys to meet the same should be raised by taxation upon the property of the town; the taxes to be collected and enforced after the act should take effect in the same manner and by the same officers as the taxes of the other wards of the city.

Default having been made in paying the interest upon the bonds, this action was brought. It was originally brought against the city of Brooklyn and its comptroller, but before it was heard the legislature of the state of New York passed the act known as the "Greater New York Charter," annexing to and consolidating with the city of New York the various municipal corporations described therein, including the city of Brooklyn. Chapter 378, Laws 1897. By

section 8 of that act all the laws theretofore passed creating any municipal debt of the corporations united and consolidated, or for the payment thereof or respecting the same, remain in full force and effect, except that the same shall be carried out by the corporation of the city of New York. The act also provides (section 1614) that pending actions relating to any of the municipal and public corporations consolidated may be continued without change of name or title, or on motion such change may be made. By an order of the court entered pending the hearing the city of New York and its comptroller were substituted as defendants. The right of the complainant to resort to a court of equity under the circumstances of the case rests upon the authority of Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. Ed. 699, and has not been challenged by the appellants.

The first question which we are called upon to consider is whether the bonds in suit were, in the hands of the complainant, valid obligations against the town of Gravesend.

Municipal Bonds—Validity—Effect of Failure to Observe Statutory Formalities.

It is conceded that the supervisor was duly authorized by the acts mentioned to pledge the credit of the town and issue its bonds for the amount of $148,000, but it is insisted that in exercising this power some of the statutory requirements in respect to the form of the bonds were not complied with. Under the act of 1893 the bonds to be created may be either coupon or registered bonds, or coupon bonds registered as to principal only. They are to be signed by the supervisor and countersigned by the treasurer of the town, and, if they are registered, bonds are to be made payable to the persons to whom they are issued, the place of registration is to be fixed in the bonds by the officers signing the same, and a certificate showing the registration is to be indorsed thereon. When sold by the payees the bonds may be registered in the names of the new purchasers. The bonds in suit purport to be registered bonds. They are signed and countersigned as the act requires, but they do not contain the name of the

payee. They are not dated, and do not on their face contain any designation of the place of registration. They are made payable in blank, and have an indorsement upon the back, "This bond is registered in town treasurer's office, Gravesend." It is objected that these departures from the prescribed form invalidate the bonds.

It was obviously the intention of the statute that the bonds to be created should be negotiable. As it authorized the creation of coupon bonds at the discretion of the supervisor, which were not to be registered even as to the principal sum, it is manifest that the provisions in respect to registration, in respect to the name of the payee, and in respect to all matters merely of form and phraseology, were not designed as limitations of his authority, or to protect the town against his abuse of his functions. They were formalities which could not subserve any essential purpose, except to assure purchasers that they were buying bonds which were literally perfect. If purchasers were willing to accept registered bonds which were not, as to particulars devised for their interests or convenience, in strict conformity with these provisions, the town could not be harmed. The provisions should therefore be considered as directory, and not mandatory, and, in the absence of any language in the act importing that noncompliance would invalidate the bonds, any departure in respect to them should not be deemed a defect of substance. "While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requirements of the statute, in order that no such burden may be carelessly imposed, yet such statutes are not of a criminal character, and the proceedings are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality." Town of Andes *v.* Ely, 158 U. S. 321, 15 Sup. Ct. 957, 39 L. Ed. 1001. In Supervisors *v.* Galbraith, 99 U. S. 214, 25 L. Ed. 410, the statute under which the municipal bonds were issued provided that

they should be "made payable to the president and directors of the company and their successors and assignees," but in lieu of complying with that provision the bonds were made payable to bearer. The court said:

"The statutory requirement in this particular in only directory. The defect is one of form, and not of substance. The irregularity was committed by the servants of the county, and the county is estopped to take advantage of it."

In Bernards Tp. *v.* Stebbins, 109 U. S. 341, 3 Sup. Ct. 252, 27 L. Ed. 956, the statute under which the municipal bonds were issued provided that they should be executed by the commissioners "under their hands and seals, respectively," and they were executed without seals. In affirming that part of the decree of the court below adjudging the bonds "to be held and deemed to be valid and effectual in law as if they had been in fact sealed by the commissioners before being issued," the supreme court quoted the language used in Draper *v.* Springport, 104 U. S. 501, 26 L. Ed. 812, as follows:

"It is apparent from the law that the substantial thing authorized to be done in behalf of the town was to pledge the credit of the town in aid of the railroad company in the construction of its road, by subscribing to its capital stock, and issuing the obligations of the town in payment thereof. The technical form of the obligations was a matter of form, rather than substance. The issue of bonds under seal, as distinguished from bonds or obligations without a seal, was merely a directory requirement."

In Town of Solon *v.* Williamsburg Sav. Bank, 114 N. Y. 122, 21 N. E. 168, the statute under which municipal bonds were issued provided that the bonds to be made and executed by commissioners should be attested by their individual seals. The court held that this provision had not been complied with, but ruled that noncompliance did not invalidate the bonds. The court said:

"There are no negative words in the statute declaring or necessarily implying such effect of the omission of the seal;

and whether or not the requirement was merely directory, as held in Draper *v.* Springport, 104 U. S. 501, 26 L. Ed. 812, inasmuch as they were issued and delivered by the commissioners in the performance of their duty, and upon a consideration, the mistake or failure to affix these seals does not defeat the enforceable validity of the bonds."

In Bank of Statesville *v.* Town of Statesville, 84 N. C. 199, where a statute authorizing the issue of town bonds subject to a vote of the qualified electors provided that they should be signed by the town magistrate, treasurer, and commissioners, it was held that the provisions were directory only, and that bonds issued after a legal vote, but signed by the magistrate and treasurer only, were valid. In First Nat. Bank of North Bennington *v.* Town of Arlington, 16 Blatchf. 57, Fed. Cas. No. 4,806, the statute under which town bonds were created required them to be registered in the clerk's office of the town. The court, in deciding that the omission of the officers of the town to cause the bonds to be registered did not impair their validity, said:

"The requirement of registration seems to be directory merely, and want of compliance was not by the terms of the act, and cannot justly be held, to affect the validity of the bonds themselves."

The objection that the bonds erroneously recited the statute under which they purported to be issued is as untenable as the others which have been considered. If there had been no recital whatever, the validity of the bonds would not have been affected by the omission. Same—Same—Recitals. A recital is valuable as affording the basis of an estoppel when it is alleged by the municipality that conditions precedent to the exercise of the power of creating bonds, prescribed by statute, have not been complied with, but otherwise it is of no significance. The erroneous recital was innocuous. Commissioners *v.* January, 94 U. S. 202, 24 L. Ed. 110; Board *v.* Beal, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966.

The fact that the bonds were not dated and did not contain

the name of any payee is of no importance. Neither a date nor a named payee is essential to the validity of negotiable instruments. The date will be computed from the day of delivery, and may be inserted by a *bona fide* holder, and any such holder is at liberty to insert the name of a payee. 2 Am. & Eng. Enc. Law, p. 320.

Same—Same—Absence of Date and Name of Payee.

The provisions of the General Statutes of the state respecting the form and registration of municipal bonds have no application to the case, because the bonds in suit, having been created under a special act prescribing the formalities to be observed in this respect, are not within the operation of the General Statutes. The special act supplies the exclusive rule by which to determine whether or not the formalities had been complied with. State *v.* Stoll, 17 Wall. 436, 21 L. Ed. 650; Townsend *v.* Little, 109 U. S. 504, 3 Sup. Ct. 357, 27 L. Ed. 1012; *In re* Murray Hill Bank, 153 N. Y. 210, 47 N. E. 298.

Same—Same—Formalities—Special and General Statutes.

If the bonds in suit had been sold for cash, we have no doubt that they would have been valid obligations against the town in the hands of the bankers who purchased them from the supervisor. Undoubtedly the statute contemplated such a sale, and the bankers, who were parties to a transaction which contravened the statute, did not acquire a valid title to the bond; but if they had subsequently paid for the bonds, and the town had received the money, it is unquestionable that the town could not have successfully defeated their title. The complainant, however, acquired the bonds without notice and for value; and, as a *bona fide* purchaser, his right to recover upon the obligations is precisely as it would be if the bonds had been those of an ordinary corporation, instead of a municipal corporation. If the power exists in the municipality to issue negotiable bonds, the *bona fide* holder is protected against irregularities on the part of its agents in negotiating them with the public. The complainant, as well as the

Same—Same—Statutory Requirements—Bona Fide Holders.

original purchasers, was bound to know that the supervisor had no authority to sell the bonds on credit; but he was not bound to know that the supervisor had made such a sale, and, when he found that they had been negotiated with the public and delivered, he was entitled to assume, in the absence of notice to the contrary, that the supervisor had negotiated them regularly and legitimately. Mercer Co. *v.* Hacket, 1 Wall. 83, 17 L. Ed. 548; Grand Chute *v.* Winegar, 15 Wall. 355, 21 L. Ed. 170; Stewart *v.* Lansing, 104 U. S. 505, 26 L. Ed. 866; Provident Life & Trust Co. *v.* Mercer Co., 170 U. S. 593, 18 Sup. Ct. 788, 42 L. Ed. 1156. The case falls directly within the recent judgment of this court in Town of Greenburg *v.* International Trust Co., 36 C. C. A. 471, 94 Fed. 755, and the language used in that case is apposite. We there said:

"The bonds in suit were issued and negotiated conformably in all respects to the provisions of the act but one. They were negotiated at par, but not for cash, and under an agreement with the purchaser that, as to a portion of the price, payment might be deferred, and collateral securities substituted meanwhile. Assuming this to have been a departure from the statutory requirement, as the plaintiff was a *bona fide* holder of the bonds, without notice of the deviation by the agents of the town from the terms of their authority, the fact did not afford any defense to his action."

It remains to be considered whether the bonds were enforceable against the city of New York. Although by the provisions of the act annexing the town of Gravesend to the city of Brooklyn the latter was not to be liable for the previous debts of the town, and the property of the city not acquired by the annexation was exempt from taxation for the payment of such indebtedness, the power and the duty were devolved upon the city by the act to raise the moneys necessary to pay such indebtedness by taxation of the property annexed. This duty it was bound to fulfill, as otherwise the creditors of the town would be remediless. It cannot be doubted that

Same—Annexation of Town—Liability of Annexing City.

the creditors of the town could, before the enactment of the Greater New York charter, have compelled the authorities of the city of Brooklyn, by *mandamus*, to assess and collect the necessary tax. Were it not so, the provision exempting the city of Brooklyn from liability for the debts of the town would have been void, because unconstitutional. Where the resource for the payment of the debts of a municipal corporation is the power of taxation existing when the debt was created, any law which withdraws or limits the taxing power, and leaves no adequate means for the payment of the debt, is forbidden by the constitution of the United States, and is null and void. Port of Mobile *v.* Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; Von Hoffman *v.* City of Quincy, 4 Wall. 535, 18 L. Ed. 403; Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395; Ralls Co. Ct. *v.* U. S., 105 U. S. 733, 26 L. Ed. 1220. The power thus devolved upon the city of Brooklyn has been destroyed by the provisions of the Greater New York charter. The remedy by a *mandamus* has been destroyed, because there is no longer any corporate body or officials to execute the mandate, and section 7 of the charter enacts that no municipal corporation whose territory is thereby annexed to the city of New York shall "levy any tax or assessment upon property within the city of New York as herein constituted." Section 5 of the charter enacts that all the valid debts of the municipal corporations, towns, incorporated villages, and school districts therein united and consolidated, as well as the debts of the city of New York, shall be common debt of the city of New York as thereby constituted, and that, so far as resort to taxation is authorized or necessary to pay such debts, such taxation shall extend equally throughout the territory of the corporation herein constituted; "it being the intent hereof that the obligations and liabilities of the city of New York, as the successor of the municipal and public corporations consolidated in it, shall be the same as and not otherwise or greater than the respective obligations and liabilities of the several constituent corporations; and that the city of New

York shall succeed in all their rights as well as to their obligations and liabilities in respect thereof."

The town of Gravesend was not enumerated as one of the consolidated municipalities, and, as it had become extinct as a municipality, it may be that the literal terms of the section referred to do not describe it. We cannot suppose, however, that it was the legislative intention that the Greater New York charter should impair the obligations of the contract between the town of Gravesend and its creditors, by destroying the remedy for enforcing the contract, or should withhold from the city of New York the power to tax the property of that town for the payment of its debts, while granting to it the power to tax such property for the payment of the debts of all the consolidated municipalities. Yet such would be the effect of the legislation unless section 5 is construed to mean that the valid debts contracted by any town, whether one having a corporate existence at the time of the enactment, or one which had lost its corporate existence by a merger with one of the constituent municipalities, are to be regarded as a part of the common debt of the city of New York. While the phraseology, read literally, may not include the debts of an extinguished municipality whose property has passed to another municipality, and from the latter to the city of New York, a more liberal reading, and one which we think accords with the legislative intention, would include them.

In Mt. Pleasant *v.* Beckwith, before referred to, a municipal corporation had been dissolved, and its territory divided between and annexed to three adjacent corporations. Upon this state of facts the court held that, unless the legislature otherwise provided, the corporations to which the territory and the inhabitants of the divided corporation had been transferred were severally liable for their proportionate share of its debts, and were vested with its power to raise revenue wherewith to pay them by levying taxes upon the property transferred, and the persons residing therein. The

court also held that the creditors of the extinguished corporation were entitled to resort to a court of equity, and affirmed a decree adjudging the three corporations liable accordingly.

Upon the conclusions we have reached, the city of New York would be liable in an action at law; but as the defense of an adequate remedy at law has not been raised by the answer, and no assignment of error has challenged the jurisdiction of the court below, we do not deem it necessary to decide that the complainants' bill should not have been entertained.

The decree is affirmed, with interest and costs.

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## BARBER ASPHALT PAV. CO.

*v.*

## FRENCH *et al.*

(*Supreme Court of Missouri, Nov. 13, 1900.*)

**Local Assessments—Front-Foot Rule—Constitutional Law—Federal Decisions.***—As the fourteenth amendment to the federal constitution, as construed by the supreme court of the United States, does not prohibit assessments on real estate for local improvements in excess of special benefits, or by methods other than according to the amount of the benefit, in a case to determine the validity of a local assessment made according to frontage, which involves no question of taking private property for public use without compensation, there is no federal question, and Norwood *v.* Baker, 172 U. S. 269, is not applicable thereto, and does not require that the long line of decisions of the supreme court of Missouri sustaining the validity of local assessments by the front-foot rule should be overruled.

**Harmless Error.**—Harmless error is not reversible error.

**Street Paving Contract—Repairs—Ultra Vires.†**—The requirement of the ordinance and paving contract in question providing for maintaining and repairing the street on which the paving was done for five years was not *ultra vires* on the part of the city, nor void.

*See Adams *v.* City of Shelbyville (Ind.), 3 Mun. Corp. Cas. 575, and *note*, p. 652 *et seq.*

†See generally, *note*, p. 257 *et seq.*

Barber Asphalt Pav. Co. *v.* French

APPEAL by defendants from Jackson county circuit court. *Affirmed.*

This suit was instituted in the circuit court of Jackson county, returnable to the October, 1899, term thereof, for the purpose of enforcing the lien of a tax bill issued by Kansas City in part payment of the cost of paving Forest avenue from Independence avenue to Twelfth street with an asphalt pavement. The petition is in the usual form. The defenses relied upon by the defendants, although stated in several different forms, may be resolved into two contentions: First, that the requirement of the ordinance and contract providing for the work, in respect to the guaranty thereof for five years, is *ultra vires* on the part of the city, and void; and, second, that the method of apportioning and charging the cost of the pavement violates the limitation of the federal constitution that no state shall deprive any person of his property without due process of law.

Case Stated.

The work done consisted of paving with asphaltum the roadway of Forest avenue, in the said city, 36 feet in width, from Independence avenue to Twelfth street, a distance of one-half of a mile. Forest avenue is one of the oldest and best improved residence streets in Kansas City, and all of the lots abutting thereon front the street, and extend back therefrom uniformly, to the depth of an ordinary city lot, to an alley. The lots are all improved, and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in character and quality. There is no showing that there is any difference in the value of any of the lots abutting upon the improvement. The evidence of four witnesses was taken, each of whom testified that each and every lot fronting on that part of the street improved was specially benefited to an amount exceeding the cost of the payment, and that each of the several lots abutting upon the improvement shared the total benefit sustained by all such lots in the proportion of the frontage of

each lot thereon to the total frontage on the improvement of all such lots. This paving procedure was inaugurated conformably to the requirements of the Kansas City charter, by the adoption of a resolution by the common council of this city declaring the work of paving the street to a stated extent, and with a pavement of a defined character, to be necessary, which resolution was first recommended by the board of public works of the city. This resolution was thereupon published for 10 days in the newspaper doing the city printing. Thereafter the resident owners of the city, owning a majority of front feet of lands belonging to such residents and fronting on that part of the street to be improved, had the right, within 30 days after the first day of the publication of the resolution, to file a remonstrance with the city clerk against the proposed improvement, and thereby to devest the common council of the power to make the improvement; and such property owners had the right, by filing within the same period a petition so to do, to have such street improved with a different kind of material or in a different manner from that specified in such resolution. In this proceeding neither such a remonstrance nor petition was filed, and the common council, upon the recommendation of the board of public works, enacted an ordinance numbered 5,891, requiring the construction of the pavement. The charter requires that a contract for such work shall be let to the lowest and best bidder. Thereupon bids for the work were duly advertised for, and, the plaintiff being the lowest and best bidder therefor, a contract was, on the 31st day of July, 1894, entered into between Kansas City and the plaintiff for the construction of said pavement. The contract expressly provides that the work shall be paid for by the issuance of special tax bills, according to the provisions of the Kansas City charter, and that the city shall not, in any event, be liable for or on account of the work. The cost of the pavement was apportioned and charged against the lots fronting thereon according to the method prescribed by the charter, which is that the total cost of the work shall be apportioned and charged

against the lands abutting thereon according to the frontage of the several lots or tracts of lands abutting upon the improvement. The charge against each tract of land is evidenced by a tax bill. The tax bill representing the assessment against each lot is, by the charter, made a lien upon the tract of land against which it is issued, and is *prima facie* evidence of the validity of the charge represented by it. Such lien can be enforced only by suit in a court of competent jurisdiction against the owners of the land charged. No personal judgment is authorized to be rendered against the owner of the land. The right is expressly conferred on the owner of reducing the amount of the recovery by pleading and proving any mistake or error in the amount of the bill, or that the work was not done in a good and workmanlike manner. The judgment was for the plaintiff for the amount due on the bill and for the enforcement of his lien, from which defendants, having unsuccessfully moved for a new trial and in arrest of judgment, have appealed.

*Ess & Georgen* and *Gage, Ladd & Small*, for appellants.

*Scarritt, Griffith & Jones*, for respondent.

GANTT, C. J. (after stating the facts). Prior to the decision of the supreme court in Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, the method adopted in the charter and ordinance of Kansas City of charging the cost of paving Forest avenue against the adjoining lots according to their frontage had been repeatedly authorized by the legislature of Missouri, and such laws had received the sanction of this court in many decisions. City of St. Louis *v.* Allen, 53 Mo. 44; City of St. Joseph *v.* Anthony, 30 Mo. 538; Neenan *v.* Smith, 50 Mo. 528; Kiley *v.* Cranor, 51 Mo. 541; Rutherford *v.* Hamilton, 97 Mo. 543, 11 S. W. 249; City of Moberly *v.* Hogan, 131 Mo. 19, 32 S. W. 1014; Farrar *v.* City of St. Louis, 80 Mo. 379. In the last-mentioned case, JUDGE NORTON for the court said: "The liability of lots fronting on a street, the paving of which is authorized to be charged with

Local Assessments—Front-Foot Rule—Constitutional Law—Federal Decisions.

the cost of the work according to their frontage, having been thus so repeatedly asserted, the question is no longer an open one in this state, and we are relieved from the necessity of examining authorities cited by counsel for plaintiff condemning what is familiarly known as the 'front-foot rule.' "

Learned counsel for defendant concede such was the state of the decided law of this state, and that the portion of the Kansas City charter known as the ninth article of the charter, which authorizes the cost of a pavement to be assessed against the lots fronting on the improvement according to their respective frontage, was framed after this court had fully considered and construed similar laws, and sustained them against the charge of unconstitutionality, and the assessment now challenged was made under the construction given by this court. They say: "The question we present is whether under the decision in Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, the provision of the Kansas City charter under which the tax bill sued on was issued is in violation of the constitution of the United States, and therefore null and void. We do not and cannot ask this court to reconsider or recast any of its former decisions on this subject. We simply present this controlling decision of the supreme court of the United States, and ask that it be applied in this case." If the facts of this case bring it within the case in judgment in Norwood *v.* Baker, this court is bound to follow that decision, and will do so, whatever views we may hold to the contrary.

In applying the principle of *stare decisis* and controlling authority, we will be safe in following that doctrine as announced by the supreme court of the United States, whose judgment on the question at bar will be final. In Cohens *v.* Virginia, 6 Wheat. 399, 5 L. Ed. 290, CHIEF JUSTICE MARSHALL said: "The counsel for the defendant in error urge, in opposition to this rule of construction, some dicta of the court in the case of Marbury *v.* Madison, 1 Cranch 137, 2 L. Ed. 60. It is a maxim, not to be disregarded, that general expressions in every opinion are to be taken in connection with the

case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for judgment. The reason for this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Further on he says, in reference to language used in Marbury *v.* Madison: "Having such cases only in its view, the court lays down a principle, which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principles;" and he concludes this point with the announcement that "the general expressions in the case of Marbury *v.* Madison must be understood with the limitations which are given them in this opinion." In the recent case of Parsons *v.* District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, the same court says: "It is trite to say that general principles announced by courts which are perfectly sound expressions of the law, under the facts of a particular case, may be wholly inapplicable in another and different case, and there is scarcely any department of the law in which it is easier to collect one body of decisions and contrast them with another in apparent conflict than that which deals with the taxing and police powers."

However familiar the facts in the Norwood-Baker Case may be, owing to the great interest excited by its promulgation, it will not be amiss to recall its salient features, for the purpose of determining its controlling effect in the case at bar. Mrs. Ellen R. Baker owned a tract of land in the village of Norwood, which intercepted Ivanhoe avenue. This avenue was 50 feet wide and had been laid out to the north and south lines of her tract. To make Ivanhoe Avenue a continuous street, it was necessary to extend it through the Baker tract, and acquire a strip thereof 50 feet wide and 300 feet long.

For this purpose a condemnation proceeding was instituted. The constitution of Ohio provides that, where private property is condemned for public use, "compensation therefor shall first be made in money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." Cities and villages in Ohio, as in Missouri, are by statute given power to lay off, establish, open, widen, narrow, straighten, extend, keep in order and repair, and light streets, alleys, public grounds and buildings, wharves, landing places, bridges, and market places within the corporation, and to appropriate private property for the use of the corporation; and each city and village may appropriate, enter upon, and hold real estate within its corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied: "For opening, widening, straightening and extending streets, alleys and avenues; also for obtaining gravel or other material for the improvement of the same, and for this purpose the right to appropriate shall not be limited to lands lying within the limits of the corporation." 1 Rev. St. Ohio 1890, § 1692, subds. 18, 33, and *Id.* tit. "Cities and Villages," pp. 429, 430, § 2232. It is further provided by the statutes of Ohio (1890) that, where private property is taken for opening and widening streets, alleys, or other public highways, the costs and expenses of the appropriation may be assessed in one of three ways—First, by the council generally upon the public; second, upon abutting, adjacent, or contiguous lots, in proportion to the benefits which may result from the improvement, or according to the value of the property assessed; third, "by the front foot of the property bounding and abutting upon the improvement as the council by ordinance, setting forth specially the lots and lands to be assessed, may determine before the improvement is made." *Id.* § 2264. The council of the village of Norwood passed an ordinance which provided for the institution of condemnation proceedings in the probate court for the ascertainment of the compensation to be paid to

Mrs. Baker for the desired strip, and also provided that the compensation paid her, and all costs of the condemnation proceeding, and all other costs, and the interest on the bonds issued, if any, to pay her for her land, should be assessed as a benefit to her upon her land abutting on the strip so taken. It thus appears that the village was invoking at one and the same time the extraordinary power of eminent domain and exercising its power of assessment to pay for the land thus taken. In the condemnation proceeding proper the jury assessed her compensation at $2,000, and that sum was paid her, and thereupon the village council assessed her with the $2,000 and all the costs of the condemnation, amounting to $218.58, as benefits to her abutting property; the result being that the village acquired her property for nothing, and charged her $218.58 for having deprived her of it. MR. JUSTICE HARLAN delivered the opinion of the court. He said: "The particular question presented for consideration involves the validity of an ordinance of that village assessing upon the appellee's land abutting on each side of the new street an amount covering, not simply a sum equal to that paid for the land taken for the street, but, in addition, the costs and expenses connected with the condemnation proceedings." The lower court adjudged that the assessment was in violation of the fourteenth amendment to the constitution of the United States, and such was the theory of the bill for injunction. *Inter alia*, JUDGE HARLAN says: "It has been adjudged that the due process of law prescribed by the [fourteenth] amendment requires compensation to be made to the owner when private property is taken for public use." Chicago, B. & Q. R. Co. *v.* City of Chicago, 166 U. S. 226. 17 Sup. Ct. 581, 38 L. Ed. 819; Long Island Water-Supply Co. *v.* City of Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165. "The taking of the plaintiff's land for the street was under the power of eminent domain. * * * But the assessment of the abutting property * * * was an exercise of the power of taxation." "Except for the provision of the constitution of Ohio above quoted, the state could have author-

ized benefits to be deducted from the actual value of the land taken, without violating the constitutional injunction that compensation be made for private property taken for public use; for the benefits received could be properly regarded as compensation *pro tanto* for the property appropriated to public use." But, asks the learned justice, does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street? The learned justice then concedes that it is the settled law of the supreme court of the United States that "abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property, such assessments resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements"; citing Mobile Co. *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Illinois Cent. R. Co. *v.* City of Decatur, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. Ed. 132; Bauman *v.* Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; and the cases there cited. He adds that, "according to the weight of judicial authority, the legislature has a large discretion in defining the territory, so deemed specially benefited by a public improvement, which may be subjected to special assessment to meet the cost of such improvements." He proceeds then to show that the power of the legislature is not unlimited, and that there is a point beyond which the legislative department may not go in exerting its power of taxation consistently with the property rights of the citizen. He concludes: "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of the excess, a taking, under the guise of taxation, of private property for public use without compensation." The learned justice, speaking for the majority

of the court, expressly disclaimed that his opinion was in conflict with Parsons *v.* District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, or Spencer *v.* Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763. From a careful reading of the case, we conclude that the supreme court decided three propositions: First, that "due process of law," as used in the fourteenth amendment to the federal constitution, requires compensation to be made to the owner of the land condemned for public use; second, that the exaction from the owner of abutting property of the cost of a public improvement in substantial excess of the special benefits received by him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation; third, that in that case the special assessment upon the abutting property of Mrs. Baker of the entire cost of opening the street, including not only the full amount paid her for the strip condemned, but the costs and expenses of the condemnation proceedings, was a taking of her property for public use without compensation; in a word, that, while nominally it was the exercise of the taxing power, it was nothing less than confiscation.

Notwithstanding the fact that the discussion took a wide range, and much that was said affords ground for the contention of learned counsel that all statutes and ordinances which assess abutting owners with the cost of paving a street according to the front-foot rule, as the charter and ordinance of Kansas City do in the case at bar, are null and void. We are of opinion that it was not the intention of the majority of the court to so hold. We think that Norwood *v.* Baker must be read with a view to the particular facts in judgment in that case, and that it was not the intention of the supreme court of the United States to overturn the long line of its own decisions which are in harmony with so many of the decisions of the courts of last resort in the several states of the Union, and upon the faith of which vast property rights have accrued. Indeed, as we understand the opinion, the court expressly

declined to shake the authority of Parsons *v.* District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, in which that court sustained an assessment per front foot upon property abutting upon a street improvement. In that opinion each of the justices who concurred in the majority opinion in Norwood *v.* Baker concurred. In the Parsons Case the supreme court adopted the language of JUDGE DILLON in his work on Municipal Corporations (4th Ed., vol. 2, § 752), as follows: "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it. Whether the expense of making such improvement shall be paid out of the general treasury or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency." And the court expressly approved the doctrine of Spencer *v.* Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763, which case originated in New York. The court of appeals of New York in an opinion by JUDGE FINCH held that assessment of abutting property is an exercise of the power of taxation, and is vested in the legislature, which determines the amount to be levied, and fixes the tax district; and its decision is final. The supreme court of the United States, in its opinion in the same case, said: "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of lands benefited thereby, and the determination of the territorial districts which should be taxed for a local improvement is within the province of legislative discretion." In Williams *v.* Eggleston, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047, the same court said: "Neither

can it be doubted that if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement." To the same effect, see Mobile Co. *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238. In Bauman *v.* Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270, the court said: "But it is for the legislature, and not for the judiciary, to determine whether the expense of a public improvement should be borne by the whole state or by the district or neighborhood immediately benefited." "The legislature, in the exercise of the right of taxation, has the authority to direct the whole or such part as it may prescribe of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefited thereby." "The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners." Some stress is laid upon the distinction between the power of the legislature in the exercise of the taxing power and that of municipalities upon which that power is conferred. But few principles are better settled in the courts of this country than this: That, where legislative powers are delegated to a municipal corporation, its discretion within the legitimate sphere of its authority is proportionately as wide as is the like discretion possessed by the legislature of the state, "and as free from outside interference, and that discretion is not subject to judicial revision or reversal." Morse *v.* City of Westport, 136 Mo. 286, 37 S. W. 934. It is true that in many jurisdictions—certainly in this state—it is true that municipal acts, whether in the form of ordinances or resolutions, may be impeached for fraud at the instance of persons injured thereby (1 Dill. Mun. Corp. [4th Ed.] § 311; Glassgow *v.* City of St. Louis, 107 Mo. 203, 17 S. W.

743); whereas courts will not inquire into the motives of the legislature. That the legislature may delegate this power to open, improve, and pave streets to municipal corporations is no longer an open question. That the charter of Kansas City fully and expressly conferred this power upon that city will not be questioned. That charter has all the dignity and force of a legislative enactment. In the case at bar there was not the slightest intimation that the ordinance was procured by fraud, or amounted to arbitrary confiscation, whereas in the Norwood Case the ordinance was arbitrary and oppressive, and could only result in depriving Mrs. Baker of her land for a public use without compensation. Under the scheme there devised, although Mrs. Baker might have been allowed every process of law to recover the value of her land taken, and a hearing as to how the value of the land taken should be apportioned over the benefit district, she could never, unless the district was enlarged, have recovered a cent for her land that was taken, and all additional efforts would simply have increased the costs which she was adjudged to pay; and thus the case properly fell within the rule announced by MR. JUSTICE HARLAN in Chicago, B. & Q. R. Co. *v.* City of Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 38 L. Ed. 819, that "the mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process into due process of law if the necessary result be to deprive him of his property without compensation." But in taxing the citizen with his proportionate share of the cost of a pavement abutting on his lot, there is no taking of property for public use.

Now, is there anything which smacks of arbitrary or fraudulent conduct? This method of taxation has passed under the scrutiny of the courts of this country, and has received their approval. JUDGE COOLEY, in his work on Taxation (page 644), says: "Such a measure of apportionment seems at first blush to be perfectly arbitrary, and likely to operate in some cases with great injustice; but it cannot be denied that in the case of some improvements frontage is a very

reasonable measure of benefits,—much more than value could be,—and perhaps approaching equality as nearly as any other estimate of benefits made by the judgment of men." JUDGE ELLIOTT, in his book on Roads and Streets (page 396), says: "The system which leads to the least mischievous and unjust consequences is that which takes into account the entire line of the way improved and apportions the expense according to the frontage; for it takes into consideration the benefit to each property owner that accrues from the improvement of the entire line of the way, and does not impose upon one lot owner an unjust portion of the burden." JUDGE SHARSWOOD, speaking for the supreme court of Pennsylvania in Hammett *v.* City of Philadelphia, 65 Pa. St. 146, says: "Perhaps no fairer rule can be adopted than the proportion of feet front, though there must be some inequalities if the lots differ in situation and depth." Such has been the holding of this court throughout its history. A rule so universally adopted and sustained can hardly be called arbitrary, or so unjust as to warrant a court to strike down the discretion of the municipality which adopts it.

It is, however, insisted that the Norwood-Baker Case does condemn this front-foot rule because it affords no opportunity for a hearing. Still conceding, as we do, that there are expressions to this effect in that opinion, it seems so clear to us that the opinion was not predicated upon the want of notice, and that no amount of notice could have availed to secure justice to Mrs. Baker under the scheme devised; that we do not believe that the supreme court intended to lay down the law that a state statute imposing taxes must necessarily and in all cases give notice and a hearing to the taxpayer before it can be held valid. We think the decisions of that court are overwhelmingly to the contrary, and we discern no purpose in this opinion to overrule and set aside all of its prior utterances on this subject. Thus, in Parsons *v.* District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, the court unanimously said: "In Hagar *v.* Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, the distinction

between a tax or assessment imposed by a direct exercise of the legislative power calling for no inquiry into the weight of evidence, nor for anything in the nature of a judicial examination, and a tax or assessment imposed upon property according to its value, to be ascertained by assessors upon evidence, was pointed out, and it was held that in the former case no notice to the owner is required, but that in the latter case the officers in estimating the value act judicially, and notice and an opportunity to be heard are necessary." In giving the opinion of the court it was said by MR. JUSTICE FIELD (page 709, 111 U. S., page 668, 4 Sup. Ct., and page 572, 28 L. Ed.): "Of the different kinds of taxes which the state may impose there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him; such as poll taxes, license taxes, and generally specific taxes on things or persons or occupations." "In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right is therefore invaded." The court further quote JUDGE COOLEY on Taxation with approval to the effect "that the whole cost [of a local improvement] in other cases is levied on lands in the immediate vicinity of the work." "In a constitutional point of view, either of these methods is admissible, and one may be sometimes just and another at other times." "The question is legislative, and like all legislative questions may be decided erroneously." The court thus approves JUDGE DILLON'S text (2 Mun. Corp. § 752), wherein the learned author says, "Whether the assessment shall be upon all property found to be benefited or alone upon the abutters according to frontage to area of their lots, is, according to the present weight of authority, considered to be a question of legislative expe-

diency;" and in Norwood *v.* Baker, Parsons *v.* District of Columbia is expressly approved by MR. JUSTICE HARLAN on the ground that it was done under an act of congress establishing a comprehensive system for the District. From the reasoning of the learned justice it is hard to escape the conclusion that he regarded the fact that the entire cost of the land taken and all the costs of the condemnation was assessed upon Mrs. Baker's land as peculiar to that case, and that a different rule would govern if the assessment per front foot had been levied under a general or comprehensive system for betterments, as was the case in Parsons *v.* District of Columbia, and which clearly exists under the charter and ordinance of Kansas City, which provide a comprehensive system for the paving of all the streets of said city, and an assessment per front foot upon all abutting property to pay therefor. It seems indisputable that, if no inquiry into benefits was required in the Parsons Case, and that act was constitutional, neither can the charter and ordinance of Kansas City, which also provide a comprehensive system of improvement, be held unconstitutional. In neither case is there any inquiry as to benefits, nor is the tax levied according to actual benefit, but both alike rest upon the conclusive presumption, indulged by congress in the one case and the charter in the other, that such an improvement is a benefit to the abutting property. Not only is this true, but the supreme court of the United States is solemnly committed to the doctrine that, if the assessment actually exceeds the cost of the work, it would not vitiate or annul the assessment. Parsons *v.* District of Columbia, 170 U. S., loc. cit. 56, 57, 18 Sup. Ct. 525, 526, 42 L. Ed. 947, 948; Leominster *v.* Conant, 139 Mass. 384, 2 N. E. 690; Village of Hyde Park *v.* Spencer, 118 Ill. 446, 8 N. E. 846.

Whether there is really a distinction between the Parsons Case and the Norwood-Baker Case if the fact of the taking of Mrs. Baker's land without compensation be dissociated from the the latter, we will not now discuss, but accepting the

whole of the Norwood Case, its approval of the Parsons Case, as well as the statement that the front-foot rule excluded an inquiry into benefits, we are of opinion that the supreme court of the United States will not condemn the assessment in the case at bar, because it falls clearly within the doctrine of the Parsons Case, and the construction placed on that case in the Norwood Case, and because no court has more emphatically determined that an assessment by the front-foot rule is an exercise of the taxing power, and is a legislative function, with which the courts have no power to interfere, and will not do so. Certainly it is true that until the decision in the Norwood-Baker Case the decisions of the supreme court hold that the fourteenth amendment to the constitution of the United States does not prohibit assessments on real estate in excess of special benefits, or by methods other than according to special benefits. In the case of Davidson *v.* City of New Orleans, 96 U. S. 97, 24 L. Ed. 616, the estate of John Davidson was assessed about $50,000 for draining certain swamp lands in the state of Louisiana. The assessment was levied according to the superficial area or square feet of land within the drainage district; that is, each square foot was taxed as much as every other square foot in the district. No inquiry was had into benefits, and the assessment was not according to benefits. It was even agreed that no drainage was done on Davidson's land, and that a part of his land needed no drainage, having already been drained. The question was squarely raised and presented whether the fourteenth amendment prohibited such an assessment. JUSTICE MILLER wrote the opinion, in which all the justices concurred, and held that the supreme court of the United States had no jurisdiction of the case, because the fourteenth amendment was not violated; that that class of cases did not fall within the provisions of the amendment. In the course of his opinion the learned judge says: "It is also said that part of the property of plaintiff which was assessed is not benefited by the improvement. This is a matter of detail, with which this court cannot interfere if it were clearly so; but it is hard to fix a limit within

these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds." At that time it is clear that the whole court held that the fact that an assessment was for an improvement which in fact was no benefit to the property owner did not bring the case within the fourteenth amendment, and it would be hard to conceive of a harder case. Subsequently, in Spencer *v.* Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763, MR. JUSTICE GRAY said: "In Davidson *v.* City of New Orleans it was held that if the work was one which the state had authority to do, and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant or that part of the property assessed was not benefited, presented no question under the fourteenth amendment to the constitution upon which this court could review the decision of the state court." And in Walston *v.* Nevin, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544, CHIEF JUSTICE FULLER said, in reference to the Davidson Case: "And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the federal constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power. Spencer *v.* Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; Stanley *v.* Supervisors, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Mobile Co. *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Hagar *v.* Reclamation Dist. 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; U. S. *v.* City of Memphis, 97 U. S. 284, 24 L. Ed. 937; Laramie Co. Com'rs *v.* Albany Co. Com'rs, 92 U. S. 307, 23 L. Ed. 552. And whenever the law operates alike on all persons and property similarly

situated, equal protection cannot be said to be denied." Wurts *v.* Hoagland, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; Richmond, F. & P. R. Co. *v.* City of Richmond, 96 U. S. 521, 24 L. Ed. 734. In Walston *v.* Nevin the assessment for the construction of a street was apportioned upon abutting land according to the number of square feet. No inquiry could have been made as to benefits any more than in the Norwood Case, and yet the court ruled it fell within the Davidson Case, and it had no jurisdiction. Finally, in Irrigation Dist. *v.* Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, an ad valorem assessment upon all the land within the district was held not contrary to the fourteenth amendment. The point was specifically made that the assessment was not made in accordance with and in proportion to the benefits conferred by the improvement, and land which could not be benefited was placed in a district to be taxed to pay for the improvements which would benefit others. The importance of the case is suggested by the great array of eminent counsel on both sides. MR. JUSTICE PECKHAM delivered the opinion. Among other things, he said: "As was said by MR. JUSTICE MILLER in Davidson *v.* City of New Orleans, where the objection was made that part of the property was not in fact benefited, this is a matter of detail, with which this court cannot interfere if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds. To the same effect: Spencer *v.* Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; Lent *v.* Tillson, 140 U. S. 316–333, 11 Sup. Ct. 825, 35 L. Ed. 419. In regard to the matters thus far discussed, we see no valid objection to the act in question." Again, he says: "The fourth objection, and also the objection above alluded to as the final one, may be discussed together, as they practically cover the same principle. It is insisted that the basis of the assessment upon the lands benefited for the cost of the con-

struction of the works is not in accordance with and in proportion to the benefits conferred by the improvement, and therefore there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law. Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation." And again: "We do not discover, and our attention has not been called to, any case in this court where such an assessment has been held to violate any provision of the federal constitution. If it do not, this court can grant no relief."

It is in view of this unbroken chain of authority, this unanimous declaration of the supreme court that the fourteenth amendment to the federal constitution does not prohibit assessments on real estate for local improvements in excess of special benefits, or by methods other than according to the amount of the benefit, and the failure of that court to criticise or overrule any of said decisions, that we say that in a case like the one at bar, involving only an assessment, or no question of taking private property for public use without compensation, there is no federal question, and that the Norwood-Baker Case does not apply to such a case, and does not require that we should overrule the long line of cases decided by this court which sustain the front-foot rule, and that until that court in a case like this shall reverse its former long line of decisions we must adhere to our own construction of our constitution and laws. Of course, if the supreme court shall in a case like this hold that the fourteenth amendment does apply, and that the assessment by the front-foot rule under the Kansas City charter is void, we shall conform to its judgment as the final arbiter under the constitution.

As the assessment was made in strict compliance with the charter and ordinance, we do not think the testimony of

the four witnesses to the effect that the benefits to the lots exceeded the cost of the improvement could cure the vice, if any, in the charter and the ordinance. Plaintiff must stand or fall by the charter provision. The admission of the evidence, however, did not constitute reversible error, as we hold the charter and the ordinance were sufficient without the evidence, and would have been had it been to the contrary.

Harmless Error.

2. The other objection remains. It is urged that the requirement of the ordinance and contract providing for maintaining and repairing the street on which the paving was done for five years is *ultra vires* on the part of the city, and void; that the power of the city to contract for repairs is limited to two years. Speaking for myself, I think the contention of the defendant is sound, but this court has ruled otherwise in Bank *v.* Woesten, 147 Mo. 467, 48 S. W. 939, and Asphalt Co. *v.* Ullman, 137 Mo. 543, 38 S. W. 458, and no good purpose will be subserved by repeating the grounds upon which I based my dissent in those cases. The question must be considered settled by the majority opinions in those cases. It follows that the judgment of the circuit court must be and is affirmed. All concur, except BURGESS, J., absent.

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*See Riparian Rights.*
Discharging sewage into river.
Platt *v.* City of Waterbury (Conn.), 442.

**WATER SUPPLY.**
*See Water Companies.*
Jurisdiction of action to enforce penalty for the pollution of common source of supply of several municipalities.
City of Durango *v.* Chapman (Colo.), 631.
Validity of ordinance to prevent pollution.
City of Durango *v.* Chapman (Colo.), 631.

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